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Somers, John Somers, baron

THE

SECURITY

OF

Engliſhmen's Lives,

OR THE

TRUST, POWER, and DUTY,

of the

GRAND JURIES

OF

ENGLAND.

EXPLAINED ACCORDING TO THE FUNDAMENTALS OF THE ENGLISH GOVERNMENT, AND THE DECLARATIONS OF THE SAME MADE IN PARLIAMENT BY MANY STATUTES.

Firſt publiſhed in the Year 1681.

By John Lord Somers

TO WHICH IS PREFIXED,

A SKETCH of the HISTORY of JURIES,

BY A BARRISTER.

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Juſtum et tenacem propoſiti virum,
Non civium ardor, prava jubentium,
Non vultus inſtantis tyranni,
Mente quatit ſolidâ.

Q. HORATII, Lib. iii. Ode iii.

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PREFACE.

THE Treatiſe which is now offered to the world, is intereſting but not new. I have undertaken the taſk of republication, as it is now become extremely ſcarce, well convinced that its ſubject, and, the inſtruction it contains, have a claim upon the attention of every man, who, from his rank and ſituation in life, may be called upon, to ſerve his country, in the honourable, and, important office, of a grand juror. An office, eſſential to the adminiſtration of ſubſtantial juſtice! by which, the grand juror, who faithfully diſcharges his duty, becomes, the guardian of innocence, the avenger of guilt, the unbiaſſed organ of truth; the preſerver of the public, and, private rights of the people, whenſoever they are menaced by power, or, endangered by popular violence.

To contribute, to ſuch important purpoſes, the following work was compoſed, in the reign of Charles II. It has been aſcribed to ſeveral great names of that time *, to the famous earl of Shafteſbury, to the earl

* See Burnet's Hiſtory of His Own Times, and Biog. Britt.

of Eſſex, a martyr for the conſtitution, under the ſecond Charles, as his father, the illuſtrious lord Capel, had been, for his attachment to Charles I. but, with a greater degree of probability, to the firſt lord Somers, an able advocate for the conſtitution, in that time of its danger: who lived to contribute to its re-eſtabliſhment by the revolution, and, to ſtrengthen it by the treaty of union, of the two kingdoms.

The Romans had extended their empire, 'till they left no poliſhed nation unſubdued. Within their frontier public ſpirit declined, and military diſcipline no longer prevailed. A mercenary ſelfiſhneſs, cowardice, mutiny, and, an abject ſubmiſſion, to the military uſurper of the day, debaſed the Roman name, formerly ſo awful. But they were bounded by fierce and barbarous tribes, in whoſe breaſts, glowed the love of liberty, and with it, the love and ſpirit of juſtice; which, had been immemorially diſtributed among the people of the north, by the uſage of juries.

Theſe barbarians, whether prompted to revenge the wrongs of mankind, or, invited by the proſpect of an eaſy conqueſt, over a people ſoftened by luxury, and, diſpirited by deſpotiſm; every where invaded the Roman provinces, and, broke that power, which had ſo long domineered over the nations of the earth.

But they carried with them, their native love of freedom, and, their attachment to trial by jury; which were deſtined to ſecure liberty, and, juſtice, to themſelves, and their poſterity, and, to compenſate eventually, for the hardſhips and calamities, inſeparable from conqueſt, by extending thoſe ineſtimable bleſſings, to the people they ſubdued.

This at leaſt has been the fortunate, and enviable, condition of this country.

The beſt writers upon the Engliſh conſtitution, trace its origin to the Saxons; who eſtabliſhed themſelves in this iſland after the final retreat of the Romans.

From the foreſt and the wilderneſs they imported, their equitable modes of trial by the people.

From Cæſar and Tacitus we derive the earlieſt and moſt authentic accounts of theſe northern conquerors; with repreſentations more engaging than any which have intervened.

Yet by gleanings and fragments of records, of the dark and illiterate ages, ſtill remaining, which become progreſſively luminous, with the increaſe of learning, we ſhall find proofs, that the ſame love of freedom, and modes of adminiſtering juſtice, were tranſmitted down, from age to age, with a religious reverence.

Nolumus mutari angliæ leges: The conſtant reſolution of our magnanimous anceſtors, has preſerved or reſtored to us, the moſt valuable privileges and cuſtoms we poſſeſs; and, which we alone, of all the nations of Europe, have ſtill retained.

In the following quotation from Tacitus, we perceive the original outline of ancient and modern juries:—*De* minoribus rebus *principes conſultant, de* majoribus omnes; *ita tamen, ut ea quoque, quorum penes* plebem *arbitrium eſt, apud principes pertractentur.*—— *Licet apud concilium accuſare quoque, et diſcrimen capitis intendere. Diſtinctio pœnarum ex delicto, proditores et trans-*

fugas arboribus ſuſpendunt, &c. De moribus Germ. Cap. 12.

To ſuch invaders, Britons owe the introduction of their admired laws and cuſtoms; which were digeſted by Alfred into a regular ſyſtem of policy and juſtice: a prince conſecrated to immortal fame by the grateful remembrance of ſucceeding ages.

A predilection for the number twelve, appears to have been common to all the northern tribes.

Hence we find in the law of Ethelred (vide Wilkin, L. L. Anglo Sax.) *Exeunt ſeniores duodecim Thani, et præfectus cum iis, et jurent ſuper ſanctuarium, quod eis in manus datur, quod nolint ullum innocentem accuſare nec aliquem noxium celare.* It deſerves to be remarked, that this is ſtill the oath adminiſtered to the grand jury.

Theſe laws, ever dear to our anceſtors, were carefully collected, and, again recognized by Edward the Confeſſor.

About this time however the ordeals, or, trials by fire and water, and, by a ſpecies of jury called compurgators, were introduced among the Saxon and Britiſh nations, and ſupported by ſuperſtitious notions of Providence.

To theſe ſucceeded the trials by battle, which continued for centuries after the trials by fire and water were aboliſhed.

Inqueſts according to Spelman, were made by juries in England, long before the Norman conqueſt, which

conſiſted of lawful men, that is men of honour and truſt, and other principal perſons in the burgh, village and hundred, where a purchaſer reſided (ſee Spelman's Gloſſary, p. 316—Dugdale Origin. Judic. c. 25. Coke 1 Inſt. § 234, and Preface to Report 8th. and Cartes Hiſtory of England, 2 vol. p. 30.)

The cuſtomary courts of copyholders, the courts baron, and county courts, continued down to our times, are a juſt repreſentation of the moſt ancient inqueſts by jury.

Dean Hicks, in a learned epiſtolary diſſertation, addreſſed to Sir G. Shower, 2 vol. Theſaur:—aſcribing to the Normans, excluſively, the credit of introducing juries into England—Gives an account, of a record of a plea of land, in the time of William the Conqueror, in which twelve men gave a verdict, afterwards diſcovered to be falſe, by a grand aſſize, of the more diſtinguiſhed barons, of the county, and, of the kingdom, ſummoned according to uſage. The former jury, was adjudged perjured, by them, and, their verdict ſet aſide.

We conſider this reſort to both Juries, as a ſtrong preſumptive proof of an inſtitution, not new, but found pre-eſtabliſhed in the country: And, on this occaſion adopted by the Normans, rather than now firſt introduced by them.

Juries having one common original, the Normans themſelves, only followed the univerſal uſage of northern nations, of which, they were a ſingle tribe, and, colony.

Nevertheleſs, it is allowed, that the completion of the feudal ſyſtem by William the Conqueror, in its conſequences, contributed to reſtore, and, extend trials

by jury. The grand juſticiary, the king's deputy, ſat as judge in the Aula Regis.

This tribunal being the king's court baron, the vaſſals of the crown attended as aſſeſſors therein. In like manner as in the courts baron of the nobility, and gentry, juſtice was adminiſtered by their vaſſals, as, *pares curiæ*.

Thus trials by peers, or juries, were eſtabliſhed by the feudal ſyſtem: And this mode of trial is preſumed to be expreſsly authoriſed in the laws of William the Conqueror*, and more fully eſtabliſhed by thoſe of his ſon, the firſt Henry †.

This eſſential part of the conſtitution acquired greater force, in the reign of Henry II. and Henry III. when it was ordained by a general law, that either party might decline the trial by battle, and, demand that his cauſe ſhould be determined by an aſſize, or jury, of twelve perſons.

The authority quoted from the gloſſary of Du Cange, in the note ‡, is too important to be omitted;

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* See Lambard leges Gul. Anglor.

† See Lambard leges Henrici I. c. 29, 31, 32. and Holingſhead's Hiſtory, vol. 3. p. 303. Edit. 1577.

‡ Jurata Anglis. Ab Henrico ſecundo Angliæ rege manaſſe dicitur, quo duellum ab ordinariis judiciis amoveret, revocaſſe Henricus II. longe probabilius dici poteſt quam inſtituiſſe. Eam quippe a Gothis mutuaſſe videntur. Quorum ea ſemper, politiæ fuit ratio, ut cui que judici, ac regi etiam in judiciis adeſſent duodecim viri adſeſſores jurati, quorum erat de ſumma controverſiæ, quoad factum judicare: Prevalentibus exinde ordalio, duello, et compurgatione, mos iſte in diſſuetudinem abiit.

DU CANGE GLOSS. TOM. 2. p. 1628.

as it ſhews, two eſſential points, that juries were in uſe before the Conqueſt, and were reſtored by Henry II.

Our anceſtors, according to Carte the hiſtorian, truſted the eſtates, liberties, and lives of the people, with ſuch implicit confidence to juries, and, witneſſes of good credit, taken with great care in the neighbourhood of the place, where facts were committed, that they ſeem, on that account, to have neglected, the additional ſecurity, of ſettling rational rules of evidence, to protect ſuch important intereſts.

"The Saxon cuſtoms, ſays this diligent inquirer, ſtill prevailed, in this point, agreeable to thoſe of all the northern nations, where none but men of good characters, none that had been cenſured in any court of judicature, civil or eccleſiaſtical, none that were known to be irreligious, liars in common converſation, greedy of money or taking bribes, partners in crimes, or ſlaves, could be admitted to give their teſtimony. It doth not appear that the law hath been altered in that reſpect by any ſtatute *."

From this foundation our judicial ſyſtem has gradually riſen to the exalted height, to which it has now attained.

In 1176 itinerant juſtices were appointed to go into every county, and, the trial by twelve men, as appears from Glanville, became general.

Lord chief juſtice Hale, in cap. 7. of his Hiſtory of the Common Law, obſerves,—"That in the county

* See Carte's Hiſtory of England, 2 vol. Henry III. p. 30.

courts, hundred courts, and courts baron, all the buſineſs of any moment, was carried by parties and factions. For the freeholders being generally judges, not only of the fact, but of the law, every man that had a ſuit there, ſped according as he could make parties, and men of great power and intereſt in the county, did eaſily overbear others, in their own cauſes, or in ſuch wherein they were intereſted, either by relation of kindred, tenure, ſervice, dependance, or application." To remedy theſe great evils, Henry II. with the advice of his parliament at Northampton, and, in the twenty-ſecond year of his reign, appointed itinerant judges; who checked theſe evils, and, rendered the adminiſtration of juſtice, more impartial, and, its deciſions more certain and uniform.

In the ſtatute of Northampton, the following clauſe *Si quis rectatus de murdro per ſacramentum duodecim Militum, de hundredo, vel per ſacramentum, duodecim liberorum legalium hominum*; is thought by ſome to be an authority manifeſting the early diſtinction of a grand and petty jury. And we find in Bracton that mere common report, which might be of a ſlanderous nature, ſhould never be the ground for indictments, which ought to ariſe only, from good and grave men, ſuch as a grand jury ought to be. *Et ſciendum quod fama, quæ ſuſpicionem inducit, oriri debet apud bonos et graves, non quidem, a malevolis et maledicis ſed providis et fide dignis perſonis. Tumultus enim, fit, et clamor populi quando-que de pluribus quæ in veritate non fundantur, et ideo vanæ voces populi non ſunt audiendæ.*—Vide Bracton, lib. 3. c. 22.

From this time there can be no doubt, that trials by jury were admitted, in all the courts, of ordinary juriſdiction, and, are expreſsly recognized and eſtabliſhed

by the great charters of John and Henry III. and, from this time too commences a diſtinction in the appellation of juries, to wit, the ASSIZA MAJOR, or grand jury, ſummoned by four knights; and, the MINOR ASSIZA, or petty jury, ſummoned by the ſheriff (vide Glanville). It was this petty jury, who, on conviction of perjury, was alone ſubject to the penalties of attaint by common law, confirmed afterwards by ſtatutes. Such laws clearly prove the early exiſtence of petty juries.

Dugdale in 21 *orig. judicialium* gives from Bracton a commiſſion 9 Henry III. of a judge of aſſize to ſummon a jury. *Et de qualibet villa comitatus G. venire facias quatuor legales homines et præpoſitum, et de quolibet Burgo vel villa mercanda duodecim legales homines et omnes milites et libere tenentes ad faciendum quod tu et prædicti juſticiarii eis dicetis ex parte noſtra ad pacem noſtram obſervandam, de his qui male creduntur vel indictantur de latrociniis roberiis vel morte hominum, &c.*

The diviſion of the one original jury into grand and, petty, ſeems to have taken place in the interval of time, between the eſtabliſhment of itinerary judges, and, the firſt magna charta of king John; an act, declaratory of the ancient law, and, of the indefeaſible right of the ſubject, to be tried by his peers. The extenſive juriſdiction of the coroner, which had been of immemorial uſage from the earlieſt times, was, henceforth, gradually narrowed, and at length limited to the inqueſt of a few great and flagrant offences, reſpecting the death of a ſubject. This happened in conſequence of the numerous indictments and preſentments which were afterwards laid before the grand jury.

Dr. Brady and all antiquaries agree, that *liberi homines* and *libere tenentes* were perſons holding by knight, or military ſervice, the only men of honour, truſt, faith, and reputation, then in the kingdom. Brady's Gloſſ. p. 51—54.

Theſe were the lawful jurors who made preſentments in pleas of the crown according to the forms of proceeding then in uſe. Ibid. p. 54.

In the reſearches of this induſtrious writer, under the head of *probi et legales homines*, it appears, that the great, and military men, to avoid the trouble of attending upon juries, bribed the bailiffs, and the ſheriffs, to omit them, and, to force into a ſervice, for which they were not intended by law, perſons of very inferior ſtations: this miſchief is mentioned by Coke, 2 Inſt. p. 447, and the end of it was *pecuniam extorquere*, 2 Weſt. c. 38——13, 20, 28 Edw. I.—42 Edw. III.

By theſe practices the determination of queſtions of property, and, thoſe relating to the reputation, liberty, and, lives of men, fell to the final judgment, of a very inferior order of men.

It is really matter of curious obſervation, that ſuch perſons ſummoned in our times to ſerve on the petty jury, ſhould ſo often imitate the great men of former times, by *ſimilar* endeavours, to avoid the moſt honourable of all offices.

The tenants in capite, and great landholders, except in ſome very important cauſes and inqueſts, withdrew from their duty; which was committed to the ſmaller freeholders now grown numerous.

A ſenſe of dignity contributed to perpetuate an alteration which lazineſs had begun. The great declined, perhaps diſdained, to mix in juries with perſons ſo much their inferiors in reputed ſtation, with which, in legal arrangement, they were, nevertheleſs, to be ranked as peers. For all under the degree of a lord of parliament are tried by a petty jury as their peers; and all barons and other lords of parliament are tried in the houſe of lords only.

This ſyſtem of trial, thus introduced by cuſtom or law, was legally authorized in the Magna Charta of king John. *Nullus liber homo*, &c. "No freeman ſhall be taken or impriſoned, or diſpoſſeſſed of his free tenements or liberties, or outlawed, or baniſhed, or any ways hurt or injured unleſs by the legal judgment of his peers, or, by the law of the land."

In ancient time, the lords of parliament often ſat in the inferior courts, with other freeholders, to give judgment in caſes of treaſon and felony againſt thoſe that were no lords of parliament; deſirous to get rid of this original duty, it was at their ſuit enacted, "That albeit the lords and peers of the realm, as judges of the parliament in preſence of the king, had taken upon them to give judgment in caſe of treaſon and felony, of ſuch as were no peers of the realm, That hereafter no peers ſhall be *driven* to give judgment on any others, than on their peers, according to the law." Stat. 4 Edw. 3. Marlb. c. ii.—Coke 2 Inſt. p. 50. and Cotton abr. p. 7.

A ſtatute which no doubt gratified the ſentiment of rank; but tended likewiſe to ſecure the lives of perſons under trial by petty juries, from the powerful influence of perſons of high rank and ſtation.

The ſame diſtinctions of condition which produced a ſeparation of the grand and petty juries, in proceſs of time occaſioned the diviſion of parliament into an upper and lower houſe *. Two important alterations reſulting from cauſes ſeemingly unimportant! To ſuch minute origins do we frequently owe our greateſt bleſſings; for the Engliſh grand jury is now the only inſtitution of the kind in Europe, and, when duly executed is one of the beſt calculated regulations for preventing the abuſes of power in the proſecution of criminals, that was ever known in the annals of the world.

The high opinion in which the ſacred obligation of an oath had been held (and 'twas holden in the higheſt reverence in the middle ages), eſtabliſhed the uſe of compurgators; by a natural affinity, and gradual tranſition of ideas, and even on better grounds, jurors originally conſidered as witneſſes only, became in time, judges as well as witneſſes, from the opinion confidently held, "that no man could ſwear to a falſehood, i. e. give a falſe verdict. Hence, though it was commonly ſaid, that truth was the province of the jurors, and, juſtice and judgment that of the judge: Bracton ſays—"Judgment belongs to the jurors, inaſmuch, as they are to ſay upon their oaths, whether one man diſſeized another."—See alſo Hale's Hiſt. C. Law.

But every human inſtitution partaking of imperfection, experience ſhewed ſometimes, the fallacy of this pious and generous opinion: Therefore the pu-

* Carte thinks this change did not take place before the latter part of the reign of Edward III. The exact time is unknown.

niſhment of attaint, enforced by various ſtatutes, was found neceſſary to check perjury, and, impiety: And, a reverſal of judgment, by another aſſize, a neceſſary remedy for the injuſtice of a falſe verdict. Jurors, however, according to Glanville, might be then excepted againſt, and, challenged on various grounds.

But, another precaution was often reſorted to, in queſtions of great moment, by appointing perſons of high honour, and, ſplendid fortune, as ſpecial jurors. At firſt, this was done by authority of parliament, in various ſpecial caſes. Vide Stat. 13 Richard II. and, 2 Henry IV. and, 10 Hen. VI. Afterwards, the granting of ſpecial juries, by application to courts of juſtice, grew a matter of courſe. It has lately been limited to civil ſuits, and, cannot be extended to criminal caſes, by Stat. 3, and, 24 George II.

A complete hiſtory of juries, is a deſideratum in our books; in this outline, imperfect as it is, I have only depended upon the evidence of our ſtatutes. And have indulged no hypotheſis, which does not evidently follow from them.

On the whole, it ſeems clear, that trials by good and lawful men, of the vicinage, has, in this country, been co-exiſtent with the eſtabliſhment of the Saxon invaders of it:

That it was, for a conſiderable time, in leſs authority, but not entirely ſuperſeded by ordeals and judicial combats—That it was reſtored in the reign of Hen. II. and, eſtabliſhed in the forms which we ſee in Glanville, forms ſuitable to the feudal ideas which then prevailed —That the article of Magna Charta, that every one ſhall be tried by his peers, is a declaration of the antient

right and uſage, as well as an authoritative re-eſtabliſhment of it—That the juriſdiction and authority of the leſſer aſſize, or, petty jury, ſtill being freeholders, in criminal as well as civil cauſes, grew from abuſes, as well as poſitive inſtitutions, which took place in that age, vid. 2 Weſtm. c. 38—That the great freeholders, from pride, as well as lazineſs, in their attendance on the itinerary judges, declining to mix with the lower freeholders, or, as peers in reſpect to the culprit; aſſumed the office which has for many ages belonged to a grand jury, and, conſtitutes their moſt important buſineſs and duty—The judging of the credibility of accuſations laid before them. That the trial is not ſimply by witneſſes, but by *jury*, the former aſſiſt, that the latter may determine by their own knowledge. Hale's Hiſt. Com. Law.

The judges, itinerant, were appointed by Henry II. in 1176, to go the circuits, to remedy the irregular, and, often tumultuous proceedings, in the county courts, where, the freeholders, being the only judges, intereſt and faction, too often prevailed in cauſes of conſequence; juſtice became more certain and conſiſtent, under the deciſions of the itinerary judges, and, was carried into all the counties in the moſt commodious manner. In the ſtatute of Northampton, theſe judges are required and authorized: "*Facient etiam aſſiſam de latronibus iniquis et malefactoribus terræ per quos ituri ſunt comitatus.*" In theſe aſſizes, they moſt probably made, the ideas of diſtinction ſubſervient to the purpoſe of ſubſtantial juſtice; and allotted the office of hearing, and adopting, or, rejecting indictments to the ſuperior order of freeholders, and, that of final judgment, to the lower aſſize, or, petty jury.

Then, and, thus, we think, began that admirable ſyſtem of criminal juriſdiction. The experience of paſt ages has improved it, and given it a ſtability, which we believe will continue its bleſſings to late poſterity.

The oath of the grand juror, points out, his two-fold duty.—To ſcreen innocence from the bluſh, and, hazard of public trial, and, to deliver real guilt over to it.

As to the former, and, moſt pleaſing part of his duty. Directed by the great and primary law, of, not doing to others, what, he would not have done to himſelf. He will neither find preſentments, without ſufficient proofs; or, ſuch as are ſo trivial, as to infer no criminal deſign, or purpoſe, if they were proven. He will reject indictments, which, though matters of fact, are not crimes. The deciſions of a grand jury ſhould be models of wiſdom, juſtice, and, humanity.

When the matter charged in the indictment, is in its nature criminal; the grand juror, will then attend to the evidence, and, find according to the certainty of it, and the clear conviction it produces in his mind. The cuſtom and law of England, requires the evidence to be impartial, true, and, conſiſtent: in no reſpect ſuſpicious, or, conjectural merely: Such, in fine, it ought to be, as would juſtify the petty jury, to convict the priſoner, if not contradicted, by defenſive evidence at the criminal bar.

For a grand jury to find on leſs evidence, viz. that of mere probability, as ſome have held; is a dereliction of truſt, and, of duty. The accuſed is thereby unjuſtly deprived of that protection, and, double-fence, ſet around his perſon and character, by our law and con-

ſtitution: And, the office, and, inſtitution itſelf, ſinks into an inert and paſſive formality of juſtice, if not into a ſervile, ſanguinary inſtrument of power, or, popular prejudice.

Having, from the pureſt ſources, briefly traced, the riſe, and progreſs of juries; let me, with the author of the following excellent work, whoever he was, earneſtly recommend to the notice of gentlemen, who ſhall ſerve on grand juries; that, whatever is valuable, and dear to individual citizens, or, in ſociety, whatever is moſt precious in the conſtitution of their country; is confided to them, and, aſſumed by them, under the obligation and ſanction of the moſt ſolemn oaths.

That it belongs eſſentially to their duty to protect innocence, and, to take care, that, inexperience, guiltleſs, unwarily entrapped, by deſigning wickedneſs, do not ſtand in that place, where manifeſt flagitiouſneſs, ought only to appear, and where it is properly ſtationed. Let them remember that the meaſure of juſtice, which they adminiſter to others, will be adminiſtred to themſelves, and, to their poſterity. That far from being acquitted of the guilt of innocent blood, ſpilt, by committing the charge which belongs to themſelves, over to the petty jury: they are accountable to God, and their country, for every error, and every enormity, which they might and ought to have prevented.

L. J.

GRAY'S-INN,
December 1, 1798.

THE

SECURITY

OF

Engliſhmen's Lives, &c.

THE principal ends of all civil government, and of human ſociety, were the ſecurity of men's lives, liberties and properties, mutual aſſiſtance, and help, each unto other, and proviſion for their common benefit and advantage; and where the fundamental laws and conſtitution of any government have been wiſely adapted unto thoſe ends, ſuch countries and kingdoms have increaſed in virtue, proweſs, wealth, and happineſs; whilſt others, through the want of ſuch excellent conſtitutions, or neglect of preſerving them, have been a prey to the pride, luſt, and cruelty of the moſt potent, and the people have had no aſſurance of eſtates, liberties or lives, but from their grace and pleaſure: They have been many times forced to welter in each others blood in their maſter's quarrel for dominion, and at beſt they have ſerved like beaſts of burden, and, by continual baſe ſubſerviency to their maſters vices, have loſt all ſenſe of true religion, virtue, and manhood.

Our anceſtors have been famous in their generations for wiſdom, piety, and courage, in forming and preſerving a body of laws to ſecure themſelves and their poſterities from ſlavery and oppreſſion, and to maintain their native freedoms; to be ſubject only to the laws made by their own conſent in their general aſſemblies, and to be put in execution chiefly by themſelves, their officers and aſſiſtants, to be guarded and defended from all violence and force, by their own arms, kept in their own hands, and uſed at their own charge under their prince's conduct; entruſting nevertheleſs an ample power to their kings, and other magiſtrates, that they may do all the good, and enjoy all the happineſs that the largeſt ſoul of man can honeſtly wiſh; and carefully providing ſuch means of correcting and puniſhing their miniſters and counſellors, if they tranſgreſſed the laws, that they might not dare to abuſe or oppreſs the people, or deſign againſt their freedom or welfare.

This body of laws our anceſtors always eſteemed the beſt inheritance they could leave to their poſterities, well knowing that theſe were the ſacred fence of their lives, liberties, and eſtates, and an unqueſtionable title whereby they might call what they had their own, or ſay they were their own men: The ineſtimable value of this inheritance moved our progenitors with great reſolution bravely from age to age to defend it; and it now falls to our lot to preſerve it againſt the dark contrivances of a popiſh faction, who would by frauds, ſham-plots, and infamous perjuries, deprive us of our birth-rights, and turn the points of our ſwords (our laws) into our own bowels; they have impudently ſcandalized our parliaments, with deſigns to overturn the monarchy, becauſe they would have excluded a popiſh ſucceſſor, and provided for the ſecurity of the religion and lives of all proteſtants: They have cauſed

Lords and Commoners to be for a long time kept in priſons, and ſuborned witneſſes to ſwear matters of treaſon againſt them; endeavouring thereby, not only to cut off ſome who had eminently appeared in parliament for our antient laws, but through them to blaſt the repute of parliaments themſelves, and to leſſen the peoples confidence in thoſe great bulwarks of their religion and government*.

The preſent purpoſe is to ſhew how well our worthy fore-fathers have provided in our law for the ſafety of our lives, not only againſt all attempts of open violence, by the ſevere puniſhment of robbers, murderers, and the like, but the ſecret poiſonous arrows that flie in the dark, to deſtroy the innocent by falſe accuſation and perjuries. Our law-makers foreſaw both their dangers from the malice, and paſſion, that might cauſe ſome of private condition, to accuſe others falſly in the courts of juſtice, and the great hazards of worthy and eminent men's lives, from the malice, emulation, and ill deſigns of corrupt miniſters of ſtate, or otherwiſe potent, who might commit the moſt odious of murders in the form and courſe of juſtice; either by corrupting of judges, as dependant upon them for their honour and great revenue, or by bribing and hiring men of depraved principles, and deſperate fortunes, to ſwear falſly againſt them; doubtleſs they had heard the Scriptures, and obſerved that the great men of the Jews ſought out many to ſwear treaſon and blaſphemy againſt Jeſus Chriſt: They had heard of Ahab's courtiers and judges, who, in the courſe, and form of juſtice,

* "The Roman Catholics have been too long oppreſſed by a narrow and intolerant policy, the pretences for which have long ceaſed."

by falſe witneſſes, murdered Naboth, becauſe he would not ſubmit his property to an arbitrary power. Neither were they ignorant of the antient Roman hiſtories, and the peſtilent falſe accuſers that abounded in the reign of ſome of thoſe emperors, under whom the greateſt of crimes was to be virtuous: Therefore, as became good legiſlators, they made as prudent proviſion as perhaps any country in the world enjoys, for equal and impartial adminiſtration of juſtice in all the concerns of the people's lives; that every man, whether lord or commoner, might be in ſafety, whilſt they lived in due obedience to the laws.

For this purpoſe it is made a fundamental in our government *, that (unleſs it be by parliament, no man's life ſhall be touched for any crime whatſoever, ſave by the judgment of at leaſt twenty-four men; that is, twelve or more, to find the bill of indictment †, whether he be peer of the realm, or commoner, and twelve peers, or above, if a lord, if not twelve commoners to give the judgment upon the general iſſue of not guilty joined; of theſe twenty-four the firſt twelve are called the Grand Inqueſt, or the Grand Jury, for the extent of their power, and in regard that their number muſt be more than twelve, ſometimes twenty-three, or twenty-five, never were leſs than thirteen, twelve whereof at leaſt muſt agree to every indictment, or elſe it is no legal verdict; if eleven of twenty-one, or of thirteen, ſhould agree to find a bill of indictment, it were no verdict. The other twelve, in commoners caſes, are called the petit-jury, and their number is ever twelve; but the jury for a peer of the realm may-

* See Ld. Cookes Inſtit. 3d part, p. 40.

† See Mag. Chart. Cooke's 2 part of Inſtit. p. 50, 51.

be more in number, though of like authority. The office and power of theſe juries is judicial, they only are the judges from whoſe ſentence the indicted are to expect life or death; upon their integrity and underſtanding, the lives of all that are brought into judgment do ultimately depend; from their verdict there lies no appeal; by finding guilty or not guilty, they do complicately reſolve both law, and fact.

As it hath been the law, ſo it hath always been the cuſtom, and practice of theſe juries, upon all general iſſues, pleaded in caſes civil as well as criminal, to judge both of the law and fact. So it is ſaid, in the report of the lord chief juſtice Vaughan *, in Buſhel's caſe, that theſe juries determine the law in all matters where iſſue is joined and tried, in the principal caſe, whether the iſſue be about a treſpaſs or a debt, or diſſeizin in aſſizes, or a tort, or any ſuch like, unleſs they ſhould pleaſe to give a ſpecial verdict, with an implicit faith in the judgment of the court, to which none can oblige them againſt their wills.

Theſe laſt twelve muſt be men of equal condition with the party indicted, and are called his peers, therefore if it be a peer of the realm, they muſt be all ſuch, when indicted at the ſuit of the king; and in the caſe of commoners, every man of the twelve muſt agree to the verdict, freely, without compulſion, fear, or menace, elſe it is no verdict. Whether the caſe of a peer be harder, I will not determine. Our anceſtors were careful that all men of the like condition, and quality, preſumed to be ſenſible of each others infirmity, ſhould mutually be judges each of others lives, and alternately

* See the Reports of the Lord Chief Juſtice Vaughan, p. 150, 151.

taſte of ſubjection and rule; every man being equally liable to be accuſed, or indicted, and perhaps to be ſuddenly judged by the party, of whom he is at preſent judge, if he be found innocent. Whether it be lord or commoner that is indicted: the law intends, as near as may be, that his equals that judge him, ſhould be his companions, known to him, and he to them, or at leaſt, his neighbours or dwellers near about the place where the crime is ſuppoſed to have been committed, to whom ſomething of the fact muſt probably be known; and though the lords are not appointed to be of the neighbourhood to the indicted lord, yet the law ſuppoſes them to be companions, and perſonally well known each unto other, being preſumed to be a ſmall number (as they have anciently been) and to have met yearly, or oftner in parliament, as by law they ought, beſides their other meetings, as the hereditary counſellors of the kings of England. If time hath altered the caſe of the lords, as to the number, indifferency, and impartiality of the peers, it hath been, and may be worthy of the parliament's conſideration, and the greater duty is incumbent upon grand juries to examine with the utmoſt diligence the evidence againſt peers, before they find a bill of indictment againſt any of them if in truth it may put their lives in greater danger.

It is not deſigned at this time to undertake a diſcourſe of petit-juries, but to conſider the nature and power of grand inqueſts, and to ſhew how much the reputation, the fortunes, and the lives of Engliſhmen depend upon the conſciencious performance of their duty.

It was abſolutely neceſſary for the ſupport of the government, and the ſafety of every man's life and intereſt, that ſome ſhould be truſted to inquire after all

ſuch as by treaſons, felonies, or leſſer crimes, diſturbed the peace, that they might be proſecuted, and brought to condign puniſhment, and it was no leſs needful for every man's quiet and ſafety, that the truſt of ſuch inquiſitions ſhould be put into the hands of perſons of underſtanding, and integrity, indifferent, and impartial, that might ſuffer no man to be falſely accuſed, or defamed, nor the lives of any to be put in jeopardy, by the malicious conſpiracies of great or ſmall, or the perjuries of any profligate wretches: For theſe neceſſary, honeſt ends, was the inſtitution of grand juries.

Our anceſtors thought it not beſt to truſt this great concern of their lives and intereſts in the hands of any officer of the king's, or in any judges named by him, nor in any certain number of men during life, leſt they ſhould be awed or influenced by great men, corrupted by bribes, flatteries, or love of power, or become negligent, or partial to friends and relations, or purſue their own quarrels or private revenges, or connive at the conſpiracies of others, and indict thereupon. But this truſt of enquiring out, and indicting all the criminals in a county, is placed in men of the ſame county, more at leaſt than twelve of the moſt honeſt, and moſt ſufficient for knowledge, and ability of mind and eſtate, to be from time to time at the ſeſſions and aſſizes, and all other commiſſions of Oyer and Terminer, named and returned by the chief ſworn officer of the the ſheriff, who was alſo by expreſs law anciently choſen annually by the people of every county, and truſted with the execution of all writs and proceſſes of the law, and with the power of the county to ſuppreſs all violences, unlawfnl routs, riots, and rebellions. Yet our laws left not the election of theſe grand inqueſts abſolutely to the will of the ſheriffs, but have deſcribed in general their qualifications, who ſhall inquire and

indict either lord or commoner. They ought, by the old common law, to be lawful liege people, of ripe age, not over aged or infirm, and of good fame amongſt their neighbours, free from all reaſonable ſuſpicion of any deſign for himſelf or others, upon the eſtates or lives of any ſuſpected criminals, or quarrel, or controverſy with any of them: They ought to be indifferent and impartial, even before they are admitted to be ſworn, and of ſufficient underſtanding and eſtate for ſo great a truſt. The ancient law book, called Briton *, of great authority, ſays, The ſheriffs bailiffs ought to be ſworn to return ſuch as know beſt how to inquire, and diſcover all breaches of the peace; and leſt any ſhould intrude themſelves, or be obtruded by others, they ought to be returned by the ſheriff, without the denomination of any, except the ſheriffs officers. And agreeable hereunto was the ſtatute of 11 H. IV. † in theſe words: *Item*, "Becauſe of late, inqueſts were taken at Weſtminſter of perſons named to the juſtices, without due return of the ſherlff, of which perſons ſome were outlawed, &c. and ſome fled to ſanctuary for treaſon and felony, &c. by whom, as well many offenders were indicted, as other lawful liege people of the king not guilty, by conſpiracy, abetment, and falſe imagination of others, &c. againſt the courſe of the common law, &c. It is therefore granted, for the eaſe and quietneſs of the people, that the ſame indictment, with all its dependencies, be void, and holden for none for ever; and that from henceforth, no indictment be made by any ſuch perſons, but by inqueſt of the king's liege people, in the manner as was uſed, &c. returned by the ſheriffs, &c. without any denomination to the

* See Brit. p. 9, and 10.

† See 11 Hen. 4.

ſheriffs, &c. according to the law of England, and if any indictment be made hereafter, in any point to the contrary, the ſame be alſo void, and holden for none for ever. *" See alſo the ſtatute of Weſtm. 2d cap. 38. and *Articul. ſuper Cortas*, ch. 9.

So careful have our parliaments been, that the power of grand inqueſts might be placed in the hands of good and worthy men, that if one man of a grand inqueſt, though they be twenty-three or more, ſhould not be *liber et legalis homo*, or ſuch as the law requires, and duly returned without denomination to the ſheriff, all the indictments found by ſuch a grand jury, and the proceedings upon them, are void and null. So it was adjudged in Scarlet's caſe.

I know too well, that the wiſdom and care of our anceſtors, in this inſtitution of grand juries, hath not been of late conſidered as it ought; nor the laws concerning them duly obſerved; nor have the gentlemen and other men of eſtates, in the ſeveral counties, diſcerned how inſenſibly their legal power and juriſdiction in their grand and petit juries is decayed, and much of the means to preſerve their own lives and intereſts taken out of their hands. 'Tis a wonder that they were not more awakened with the attempt of the late Lord Chief Juſtice K. who would have uſurped a lordly dictatorian power over the grand jury of Somerſetſhire, and commanded them to find a bill of indictment for murder, for which they ſaw no evidence, and, upon their refuſal, he not only threatened the jury, but aſſumed to himſelf an arbitrary power to fine them.

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* See Coke Inſtit. 3d part, fol. 33.

Here was a bold battery made upon the ancient fence of our reputations and lives. If that juſtice's will had paſſed for law, all the gentlemen of the grand juries muſt have been the baſeſt vaſſals to the judges, and have been penally obliged, *jurare in verba magiſtri,* to have ſworn to the directions or dictates of the judges: but thanks be to God, the late long parliament (though filled with penſioners) could not bear ſuch a bold invaſion of the Engliſh liberty; but upon the complaint of one Sir Hugh Windham, foreman of the ſaid jury, and a member of that parliament, the commons brought the then Chief Juſtice to their bar, to acknowledge his fault, whereupon the proſecution ceaſed.

The truſt and power of grand juries, is, and ought to be, accounted amongſt the greateſt, and of moſt concern, next to the legiſlative. The juſtice of the whole kingdom, in criminal caſes, almoſt wholly depending upon their ability and integrity, in the due execution of their office. Beſides, the concernments of all commoners, the honour, reputation, eſtates, and lives of all the nobility of England, are ſo far ſubmitted to their cenſure, that they may bring them into queſtion for treaſon, or felony, at their diſcretion; their verdict muſt be entered upon record, againſt the greateſt lords, and proceſs muſt legally go out againſt them thereupon, to impriſon them if they can be taken, or to outlaw them as the ſtatutes direct; and if any peer of the realm, though innocent, ſhould juſtly fear a conſpiracy againſt his life, and think fit to withdraw, the direction of the ſtatutes, in proceeding to the outlawry, being rightly purſued, he could never reverſe the outlawry, as the law now ſtands, ſave by pardon, or act of parliament. Hence it appears, that in caſe a grand jury ſhould be drawn to indict a noble peer unjuſtly, either by means of their own weakneſs, or partiality, or a blind ſubmiſ-

ſion to the direction or opinion of judges; one ſuch failure of a jury, may occaſion the ruin of any of the beſt or greateſt families in England. I mention this extent of the grand juries power over all the nobility, only to ſhew their joint intereſt and concern with the commons of England in this ancient inſtitution.

The grand juries are truſted to be the principal means of preſerving the peace of the whole kingdom, by the terror of executing the penal laws againſt offenders, by their wiſdom, diligence, and faithfulneſs in making due inquiries after all breaches of the peace, and bringing every one to anſwer for his crime, at the peril of his life, limb, and eſtate; that every man, who lives within the law, may ſleep ſecurely in his own houſe.

'Tis committed to their charge and truſt to take care of bringing capital offenders to pay their lives to juſtice and leſſer criminals to other puniſhments, according to their ſeveral demerits. The courts, or judges, or commiſſioners of Oyer and Terminer, and of gaol delivery, are to receive only from the grand inqueſt, all capital matters whatſoever, to be put in iſſue, tried and judged before them by the petit juries. The whole ſtream of juſtice, in ſuch caſes, either runs freely, or is ſtopped and diſturbed as the grand inqueſts do their duties, either faithfully and prudently, or neglect or omit them.

And as one part of their duty is to indict offenders, ſo another part is to protect the innocent, in their reputations, lives and intereſts, from falſe accuſers and malicious conſpirators. They are to ſearch out the truth of ſuch informations as come before them, and to reject the indictment if it be not ſufficiently proved,

and farther, if they have reaſonable ſuſpicion of malice, or wicked deſigns againſt any man's life or eſtate, by ſuch as offer a bill of indictment, the laws of God, and of the kingdom, bind them to uſe all poſſible means to diſcover the villainy; and if it appear to them (whereof they are the legal judges) to be a conſpiracy, or malicious combination againſt the accuſed, they are bound by the higheſt obligations upon men and chriſtians, not only to reject ſuch a bill of indictment, but to indict forthwith all the conſpirators, with their abettors and aſſociates.

Doubtleſs there hath been pride and covetouſneſs, malice, and deſire of revenge, in all ages, from whence have ſprung falſe accuſations and conſpiracies; but no age before us ever hatched ſuch villainies, as our popiſh faction have contrived againſt our religion, lives, and liberties. No Hiſtory affords an example of ſuch forgeries, perjuries, ſubordinations, and combinations of infamous wretches, as have been lately diſcovered amongſt them, to defame loyal, innocent proteſtants, and to ſhed their guiltleſs blood in the form and courſe of juſtice, and to make the King's moſt faithful ſubjects appear to be the vileſt traitors unto him. In this our miſerable ſtate, grand juries are our only ſecurity, in as much as our lives cannot be drawn into jeopardy, by all the malicious crafts of the devil, unleſs ſuch a number of our honeſt countrymen ſhall be ſatisfied in the truth of the accuſations. For prevention of ſuch plotters of wickedneſs as now abound, was that ſtatute made in the 42 of Edward III. * in theſe words: "To eſchew the miſchiefs and damage done to divers of the Commons by falſe accuſers, which oftentimes have made the

* See the Statute, 42 Ed. III. 3.

accuſations more for revenge and ſingular benefit, than for the profit of the king, or for his people; which accuſed perſons ſome have been taken, and ſometimes cauſed to come before the King's Council by writ, and otherwiſe, upon grievous pain, againſt the law: It is aſſented and accorded, for the good government of the Commons, that no man be put to anſwer without preſentment before juſtices, or matter of record, &c. according to the old law of the land, and if any thing be done to the contrary, it ſhall be void in law," &c. And (ſaith the ſtatute of 25 Ed. III. 4.) " None ſhall be taken by petition, or ſuggeſtion made to the King or to his council, unleſs it be by indictment, or preſentment of good and lawful people, of the ſame neighbourhood where ſuch deeds be done," &c. That is to ſay, by a grand jury.

All our lives are thus by law truſted to the care of our grand inqueſts, that none may be put to anſwer for their lives, unleſs they indict them. If a cauſeleſs indictment of any man ſhould careleſsly paſs from them, his guiltleſs blood, or what prejudice ſoever the accuſed ſhould thereby ſuffer, muſt reſt upon them, who by breach of their truſt were the occaſions of it; their fault cannot be excuſed by the proſecution of an attorney, or ſolicitor general, or any other accuſer, if it were in their power to be more truly informed in the caſe. Whoſoever prevents not an evil, when he may, conſents to it.

Now to oblige theſe juries to the more conſcientious care, to indict all that ſhall appear to them criminals, and to ſave every innocent, if it may be, from unjuſt vexation and danger, by malice and conſpiracy, our anceſtors appointed an oath to be impoſed upon them, which cannot be altered, except by act of parlia-

ment; therefore every grand jury man is ſworn, as the foreman, in the words following, viz.

"You ſhall diligently inquire, and true preſentment make of all ſuch articles, matters, and things as ſhall be given you in charge, And of all other matters and things as ſhall come to your own knowledge touching this preſent ſervice. The King's council, your fellows, and your own, you ſhall keep ſecret. You ſhall preſent no perſon for hatred or malice; neither ſhall you leave any one unpreſented for favour, or affection, for love or gain, or any hopes thereof: but in all things you ſhall preſent the truth, the whole truth, and nothing but the truth, to the beſt of your knowledge. So help you God." The tenor of the oath is plain, ſaying in theſe words, All ſuch matters and things as ſhall be given you in charge. But whenſoever a general commiſſion of Oyer and Terminer is iſſued, all capital offences are always the principal matters given in charge to the grand jury, which is enough for the preſent diſcourſe on their duty: hence then it evidently appears, that every grand jury is bound to enquire diligently after the truth of every thing, for which they ſhall indict or preſent any man. They are not only bound by the eternal law of loving their neighbour, to be as tender of the life and good name of every man, as of their own, and therefore to take heed to the truth in accuſing or indicting any man, but their expreſs oath binds them to be diligent in their enquiries that is, to receive no ſuggeſtion of any crime for truth, without examining all the circumſtances about it, that fall within their knowledge; they ought to conſider the firſt informers, and enquire as far as they can into their aims and pretences in their proſecutions; if revenge or gain ſhould appear to be their ends, there ought to be the greater ſuſpicion of

the truth of their accuſations; the law intending all indictments to be for the benefit of the king and his people, as appears by the ſtatute of 42 E. III. 3. Next the jury are bound to enquire into the matters themſelves, whereof any man is accuſed, as to the time, place, and all other circumſtances of the fact alledged. There have been falſe informers, that have ſuggeſted things impoſſible; for inſtance, That thirty thouſand men in arms were kept in readineſs for an exploit, in a ſecret place, as if they could have been hid in a chamber, or a cabinet. The jury ought alſo to enquire after the witneſſes, their condition and quality, their fame and reputation, their means of ſubſiſtence, and the occaſion whereby the facts whereof they bear witneſs came to their knowledge. Sometimes perſons of debauched lives, and low condition, have depoſed diſcourſes, and treaſonable councils againſt perſons of honour and virtue, ſo unlikely to come to their knowledge, if ſuch things had been, that their pretence of being privy to them, was a ſtrong evidence that their whole ſtory was falſe and feigned. It is alſo agreeable unto our ancient law and practice, and of great conſequence in caſes of treaſon or felony, that the jury enquire after the time when firſt the matters depoſed came to the witneſſes knowledge, and whether they purſued the directions of the law in the immediate diſcovery and purſuit of the traitor or felon, by hue and cry, or otherwiſe, or how long they concealed the ſame; their teſtimony being of little or no value, if they have made themſelves partakers of the crime by their voluntary concealment.

Neither may the jury lawfully omit to enquire concerning the parties accuſed, of their quality, reputation, and the manner of their converſation, with many other circumſtances; from whence they may be

greatly helped to make right inferences of the falſhood or truth of the crimes whereof any man ſhall be accuſed. The jury ought to be ignorant of nothing whereof they can enquire, or be informed, that may in their underſtandings enable them to make a true preſentment or indictment of the matters before them.

When a grand jury is ſworn to enquire dlligently after all treaſons, &c. 'tis natural and neceſſary to their buſineſs, to think of whom they ſhould enquire; and 'tis plainly and eaſily reſolved, that they ought to enquire of every man that can or will inform them; and if any kind of treaſon be ſuggeſted to them, to have been done by any man, or number of men, their duty is the ſame in that particular, as it was in the general; that is, to ſeek diligently to find the truth. 'Tis certainly inconſiſtent with their oaths, to ſhut their ears againſt any lawful man, that can tell them any thing relating unto a crime in queſtion before them; no man will believe, nor can they themſelves think, that they deſire to find and preſent the truth of a fact, if they ſhall refuſe to hear any man, who ſhall pretend ſuch knowledge of it, or ſuch material circumſtances, as may be uſeful to diſcover it; whether that which ſhall be ſaid by the pretenders, will anſwer the juries expectations, muſt reſt in their judgments, when they have heard them. It ſeems therefore from the words of the oath, that there is no bound or limit ſet, ſave their own underſtanding or conſcience, to reſtrain them to any number or ſort of perſons of whom they are bound to enquire; they ought firſt and principally to enquire of one another mutually, what knowledge each of them hath of any matters in queſtion before them; the law preſumes, that ſome at leaſt of ſo many ſufficient men of a county, muſt know or have heard of all notable things done there againſt the public peace; for that

end the juries are, by the law, to be of the neighbourhood to the place where the crimes are committed. If the parties, and the facts whereof they are accuſed, be known to the juries, or any of them, their own knowledge will ſupply the room of many witneſſes. Next, they ought to enquire of all ſuch witneſſes as the proſecutors will produce againſt the accuſed; they are bound to examine all fully and prudently to the beſt of their ſkill; every juryman ought to aſk ſuch queſtions, (by the foreman at leaſt) as he thinks neceſſary to reſolve any doubt that may ariſe in him, either about the fact, or the witneſſes, or otherwiſe; if the jury be then doubtful, they ought to receive all ſuch further teſtimony as ſhall be offered them, and to ſend for ſuch as any of them do think able to give teſtimony in the caſe depending.

If it be aſked how, or in what manner, the juries ſhall enquire, the anſwer is ready, according to the beſt of their underſtandings. They only, not the judges, are ſworn to ſearch diligently to find out all treaſons, &c. within their charge, and they muſt and ought to uſe their own diſcretion in the way and manner of their enquiry. No directions can legally be impoſed upon them by any court or judges; an honeſt jury will thankfully accept good advice from judges, as their aſſiſtants; but they are bound by their oaths to preſent the truth, the whole truth, and nothing but the truth, to the beſt of their own, not the judges, knowledge. Neither can they, without breach of that oath, reſign their conſciences, or blindly ſubmit to the dictates of others; and therefore ought to receive, or reject ſuch advices, as they judge them good or bad.

If the jury ſuſpect a combination of witneſſes againſt any man's life, (which perhaps the judges do not diſcern) and think it needful to examine them privately and ſeparately, the diſcretion of the juries in ſuch a caſe, is their only, beſt, and lawful guide; though the example of all ages and countries, in examining ſuſpected witneſſes privately and ſeparately, may be a good direction to them.

Nothing can be more plain and expreſs, than the words of the oath are to this purpoſe. The jurors need not ſearch the law books, nor tumble over heaps of old records for the explanation of them. Our greateſt lawyers may from hence learn more certainly our ancient law in this caſe, than from all the books in their ſtudies. The language wherein the oath is penned, is known and underſtood by every man, and the words in it have the ſame ſignification, as they have whereſoever elſe they are uſed. The judges (without aſſuming to themſelves a legiſlative power) cannot put a new ſenſe upon them, other than according to their genuine, common meaning. They cannot magiſterially impoſe their opinions upon the jury, and make them forſake the direct words of their oath, to purſue their gloſſes. The grand inqueſt are bound to obſerve alike ſtrictly every part of their oath, and to uſe all juſt and proper ways which may enable them fully to perform it; otherwiſe it were to ſay, that after men had ſworn to inquire diligently after the truth, according to the beſt of their knowledge, they were bound to forſake all the natural and proper means which their underſtandings ſuggeſt for the diſcovery of it, if it be commanded by the judges.

And, therefore, if they are jealous of a combination of the witneſſes, or that corruption and ſubordination hath

been made uſe of, they cannot be reſtrained from aſking all ſuch queſtions as may conduce to the ſifting out of the truth, nor from examining the witneſſes privately and ſeparately; leſt (as Forteſcue * ſays) "The ſaying of one ſhould provoke or inſtruct others to ſay the like.

Nor are the jury tied up to enquire only of ſuch crimes as the judges ſhall think fit to give them directly in charge, much leſs of ſuch bills only as ſhall be offered to them; but their enquiry ought to extend to "All other matters and things which ſhall come to their knowledge, touching the preſent ſervice." If they have ground to ſuſpect that any accuſation before them proceeds from a conſpiracy, they are obliged by their oaths to turn the inquiry that way, and if they find cauſe, not only to reject the bills offered upon ſuch teſtimonies, but to indict ſuch witneſſes, and all the abettors of their villainy.

They are carefully to examine what ſort of men the witneſſes are; for tis a rule in all laws, that *turpes a tribunalibus arcentur*, vile perſons ought to be rejected by courts of juſtice. Such witneſſes would deſtroy juſtice inſtead of promoting it; and the grand jury are to take care of admitting ſuch. They may and ought, if they have no certain knowledge of them, to aſk the witneſſes themſelves of their condition, and way of living, and all other queſtions which may beſt inform them what ſort of men they are. Tis true, it may be lawful for the witneſſes, in many caſes, to refuſe to give anſwer to ſome demands which the jury may make; as where it would be to accuſe themſelves of

* Fort. D. Laud. Leg. Ang. cap. 26.

crimes; but yet that very refuſal, or avoiding to give direct anſwers, may be of great uſe to the jury, whoſe only buſineſs is to find out the truth; and who will be in a good meaſure enabled to judge of the credit of ſuch witneſſes, as dare not clear themſelves of crimes which common fame, or the knowledge of ſome of the grand inqueſt has charged them with.

If the witneſſes which come before the grand jury upon an indictment for treaſon, ſhould diſcover upon their examination, that they concealed it a long time without juſt impediment; the preſumption of the law will be ſtrong againſt them, that no ſenſe of honeſty or of their duty brought them at laſt to reveal it.

It appears by Bracton, that ancient writer of our laws *, that in caſes of treaſon, the juries were, in his days, adviſed (as now they ought) to be ſo ſevere in their inquiry within what time the witneſſes diſcovered the treaſon after it came to their knowledge, that if it were not evident that they revealed it with as much expedition as was well poſſible for them, they were not by law to be heard as witneſſes; it was ſcarce permitted them, ſaith he, to look back in their going, ſuch ought to be their ſpeed to make known the treaſon. Or if in any caſe they be otherwiſe openly flagitious, though they be not legally infamous, or if they are men of deſperate fortunes, ſo that the temptation of want is manifeſtly ſtrong upon them, and the reſtraint of conſcience can be ſuppoſed to be little or none at all; whatever they

* Brac. L 3. C. 3. Non morari debet, &c. nec debet ad aliqua negotia, quamvis urgentiſſima, ſe convertere, quia vix permittitur ei quod retro aſpiciat, &c. Si poſt intervallum accuſare velit, non erit de jure audiendus.

ſay, is, at leaſt, to be heard with extraordinary caution if not totally rejected. In Scotland *, ſuch a degree of poverty, that a witneſs cannot ſwear himſelf to be worth ten pounds, is ſufficient to lay him aſide wholly in theſe high concernments of criminal caſes. And in ſome other kingdoms, to be a looſe liver, is an objection of the ſame force againſt any produced for witneſſes.

And, for the better diſcovery of the truth of any fact in queſtion, the credit of the witneſſes, and the value of the teſtimonies; it is the duty of the grand inqueſt to be well informed concerning the parties indicted; of their uſual reſidence, their eſtates and manner of living, their companions and friends, with whom they are accuſtomed to converſe, ſuch knowledge being neceſſary to form a good judgment upon moſt accuſations; but moſt of all in ſuſpicions or indictments of ſecret treaſons, or treaſonable words, where the accuſers can be of no credit, if it be altogether incredible that ſuch things as they teſtify ſhould come to their knowledge.

Sometimes the quality of the accuſed perſon may ſet him at ſuch a diſtance from the witneſſes, that he cannot be ſuppoſed to have converſed with them familiarly, if his wiſdom and conduct has been always ſuch that it is not credible he would truſt men ſo inconſiderable, or meer ſtrangers to him, and ſuch as are wholly incapable to aſſiſt in the deſign, which they pretend to diſcover.

Can the grand inqueſt believe ſuch teſtimony to be of any value? or, can they avoid ſuſpecting malice,

* S. G. Mackenzy, Crim. Law, lib. 26. 3.

combination, and ſubordination in ſuch a caſe? or, can they ſhew themſelves to be juſt, and conſcientious in their duty, if they do not ſuſpend their verdict until further inquiry, and write *ignoramus* upon the bill?

It is undoubtedly law which we find reported in Stiles*, That "though there be witneſſes that prove the bill, yet the grand inqueſt is not bound to find it, if they ſee cauſe to the contrary."

Now to make their inquiry more inſtrumental and advantageous to the execution of juſtice, they are enjoined by their oath to keep ſecret "the King's counſel, their fellows, and their own." Perhaps tis not ſufficiently underſtood or conſidered, what duty is enjoined to every man of a grand inqueſt by this clauſe of their oath, being ſeldom, if ever, explained to them in the general charge of the judges at ſeſſions or aſſizes. But it is neceſſary that they ſhould apprehend what counſel of the King is truſted with them. Certainly there is, or ought to be, much more of it communicated to them, than is commonly thought, and in things of the greateſt conſequence. To them ought to be committed, in the ſeveral counties where any proſecutions are begun, the firſt informations and ſuſpicions of all treaſons, murders, felonies, conſpiracies, and other crimes, which may ſubvert the government, endanger, or hurt the king, or deſtroy the lives or eſtates of the innocent people, or any way diſquiet or diſturb the common peace. Our law intends the councils of the king to be continually upon the protection and ſecurity of the people, and prevention of all their miſchiefs and dangers by wicked, lawleſs, and injurious

* Stiles Repor. 11.

men. And in order thereunto to be adviſing how to right his wronged ſubjects in general, if the public ſafety be hazarded by treaſons of any kind; or their relations ſnatched from them by murderers, or any way deſtroyed by malicious conſpirators in form of law; or their eſtates taken away by robbery and thieves, or the peace broken. And for theſe ends to bring to exemplary putice all offenders, to deter others from the like wickedneſs. And until theſe counſels of the King come to the grand jury, he can bring no ſuch criminals to judgment, or to anſwer to the accuſations and ſuggeſtions againſt them. Hence it becomes unavoidably neceſſary to reveal to the grand juries, all that hath been diſcovered to the king, or any of his miniſters, judges, or juſtices, concerning any treaſons or other offences, whereof any man is accuſed. And where ſuſpicion hath cauſed any to be impriſoned, all the grounds of their ſuſpicions ought be opened, concerning the principals and the acceſſaries, as well before as after the fact, all the circumſtances and preſumptions that may induce a belief of their guilt, and all notices whatſoever, which may enable the jury to make a more exact and effectual inquiry, and to preſent the whole truth. They themſelves will not only be offenders againſt God by reaſon of their oath, but ſubject to legal puniſhments, if they knowingly conceal any criminals, and leave them unpreſented; and none can be innocent, who ſhall conceal from them any thing that may help and aſſiſt them in their duty.

The firſt notices of crimes, or ſuſpicions of the criminals, by whomſoever brought in, and the intentions of ſearching them out, and proſecuting them legally, are called the King's counſel, becauſe the principal care of executing juſtice is entruſted to him, and they are to be proſecuted at his ſuit, and in his name; and ſuch

proceedings are called pleas of the crown. From hence may be eaſily concluded, that the King's counſel, which by the oath of the grand inqueſt is to be kept ſecret, includeth all the perſons offered to them to be indicted, and all the matters brought in evidence before them, all circumſtances whatſoever whereof they are informed, which may any way conduce to the diſcovery of offences; all intimations given them of abettors and encouragers of treaſons, felonies, or perjuries and conſpiracies, or of the receivers, harbourers, nouriſhers, and concealers of ſuch criminals.

Likewiſe the oath which enjoins the counſel of their fellows, and their own to be kept, implies that they ſhall not reveal any of their perſonal knowledge concerning offences or offenders, nor their intentions to indict any man thereupon; nor any of the propoſals and advices amongſt them of ways to inquire into the truth of any matter before them, either about the crimes themſelves, or the accuſers and witneſſes, or the party accuſed, nor the debates thereupon amongſt themſelves, nor the diverſity of opinions in any caſe before them.

Certainly this duty of ſecrecy concerning the King's counſel, was impoſed upon the grand inqueſt with great reaſon, in order to the public good. It was intended that they ſhould have all the advantages which the ſeveral caſes will afford, to make effectual inquiries after criminals, to offer them to juſtice. If packs of thieves, private murderers, ſecret traitors, or conſpirators and ſuborners, can get intelligence of all that is known of their villainies, all the parties concerned may conſult together, how to hide their crimes, and prevent ſuch further inquiries as can be made after them; they may form ſham ſtories by agreement, that may have appearance of truth, to miſlead and delude

the jury in their examination, and avoid contradicting each other, they may remove or conceal all ſuch things as might occaſion a fuller diſcovery of their crimes, or become circumſtantial evidences againſt any of their aſſociates, if one or more of them be known or taken, or is to be indicted. There hath been confederates in high crimes, who have ſecured themſelves from the juſtice done upon ſome of their companions, by their confident appearance and denial of the fact, having been emboldened therein from their knowledge of all the grounds of ſuſpicion, and all the witneſſes examined about them, and the matter of their teſtimonies. Tis too well known what helps of diſcovering the whole popiſh plot were loſt through the want of keeping ſecret the King's counſel therein, before the matter was brought either to the parliament, or to any grand inqueſt: and thereby they were diſabled for the effectual execution of their offices, and could never ſearch into the bowels of that dangerous treaſon in any county. But our law having placed this great truſt of inquiry in the prudence and faithfulneſs of the grand inqueſt, was careful that they might not diſable themſelves for their own truſt, by the indiſcretion or worſe fault of any of their own number, in revealing the King's counſel or their own.

And as it was intended hereby to preſerve unto them all reaſonable helps for their bringing to light the hidden miſchiefs that might diſturb the common peace, ſo it was neceſſary to prevent the flight of criminals; if the evidence againſt one that is accuſed ſhould be publickly known, whether it ſhould be ſufficient for an indictment of him, and how far it extends to others, his confederates and accomplices might eaſily

have notice of their danger, and take opportunity to eſcape from juſtice.

Yet the reaſon will be ſtill more manifeſt for keeping ſecret the accuſations and the evidence by the grand inqueſt, if it be well conſidered, how uſeful and neceſſary it is for diſcovering truth in the examinations of witneſſes in many, if not in moſt, caſes that may come before them; when if by this privacy witneſſes may be examined in ſuch manner and order, as prudence and occaſion direct; and no one of them be ſuffered to know who hath been examined before him, nor what queſtions have been aſked him, nor what anſwers he hath given, it may probably be found out whether a witneſs hath been biaſſed in his teſtimony by malice or revenge, or the fear or favour of men in power, or the love or hopes of lucre and gain in preſent or future, or promiſes of impunity for ſome enormous crime.

The ſimplicity of truth in a witneſs may appear by the natural plainneſs, eaſineſs, and directneſs of his anſwers to whatever is propounded to him, by the equality of his temper, and ſuitableneſs of his anſwers to queſtions of ſeveral kinds, and perhaps to ſome that may be aſked for trial ſake only of his uprightneſs in other matters. And the falſeneſs, malice or ill deſign of another, may be juſtly ſuſpected from his ſtudiouſneſs and difficulty in anſwering, his artifice and cunning in what he relates, not agreeable to his way of breeding and parts, his reſerved, indirect, and evaſive replies to eaſy queſtions, his pretences of doubtfulneſs and want of remembring things of ſuch ſhort dates, or ſuch notoriety, that tis not credible he could be ignorant or forgetful of them. In this manner the truth may be evidenced to the ſatisfaction of the jurors con-

ſciences, by the very demeanour of the witneſſes in their private examinations, inaſmuch as the greateſt certainty doth often ariſe from the careful obſervation and comparing of ſuch minute matters, of which a diſtinct account is not poſſible to be given to a court: and for that reaſon, among others, the juries are made the only abſolute judges of their evidence.

Yet further, their private examinations may diſcover truth out of ſome diſagreement of the witneſſes, when ſeparately interrogated; and every of the grand inqueſt aſk them queſtions, for his own ſatisfaction, about the matters which have come to his particular knowledge, and this freely, without awe or controul of judges, or diſtruſt of his own parts, or fear to be checked for aſking impertinent queſtions.

Conſpiracies againſt the lives of the innocent, in a form of juſtice, have been frequently detected, by ſuch ſecret and ſeparate examination of witneſſes. The ſtory of Suſanna is famous; that two of their elders and judges of great credit and authority, teſtified in the open aſſembly, a malicious invention againſt her, with all the ſolemnity uſed in capital caſes, and ſentences of death paſſed upon her, and was ready to be executed, had not wiſe Daniel cried out in her behalf, "Are ye ſuch fools, O Iſraelites, that without examination or knowledge of the truth *, ye have condemned a daughter of Iſrael? Return, ſaid he, again to judgment, and put theſe two one far from another, and I will examine them." And being aſked ſeparately,

* Note that the teſtimony given in the aſſembly without ſeparating the witneſſes, and trying the truth by circumſtances, was eſteemed no examination or knowledge of the truth.

(though in public the teſtimony having been ſo given before) concerning the place of the fact then in queſtion, they had not agreed upon that circumſtance as they had upon their ſtory, and ſo their falſhood became manifeſt; one ſaying the adultery was committed under a lentiſk tree, and the other, it was under a prime tree; and upon that conviction of the falſe witneſſes, the whole aſſembly cried with a loud voice, and praiſed God. Theſe falſe witneſſes were put to death as their law required.

We have alſo a late inſtance of the uſefulneſs of private and ſeparate examinations, in the caſe of the lord Howard, againſt whom the Attorney General proſecuted an accuſation of treaſon, the laſt midſummer term, before the grand inqueſt for Middleſex. Mrs. Fitz-Harris, and Tereſa Peacock her maid, ſwore words of treaſon againſt him poſitively, and agreed in every point whilſt they were together; but, by the prudence of the inqueſt, being put aſunder, and the miſtreſs aſked how her maid came to be admitted to the knowledge of ſuch matters, ſhe had an evaſion ready, pretending her maid to have craftily hearkened behind a wainſcot door, and ſo heard the treaſon. But the maid, not ſuſpecting what her miſtreſs had ſaid, continued her firſt ſtory, that ſhe heard the treaſon from the lord Howard himſelf, and was as much truſted by him as her miſtreſs. By this circumſtance, the falſhood and perjury (which Mrs Fitz-Harris hath ſince acknowledged) was diſcovered, and the ſnare for the life of the injured lord was broken, as is manifeſt by his liberty now obtained by law.

Witneſſes may come prepared, and tell plauſible ſtories in open court, if they know from the proſecutor to what they muſt anſwer; and have agreed and ac-

quainted each other with the tales they will tell, and have reſolved to be careful, that all their anſwers to croſs interrogatories, may be conformable to their firſt ſtories. And if theſe relate only to words ſpoken at ſeveral times in private to diſtinct witneſſes, in ſuch a caſe, evidence, if given in open court, may ſeem to be very ſtrong againſt the perſon accuſed, though there be nothing of truth in it. But if ſuch witneſſes were privately and ſeparately examined by the grand inqueſt, as the law requires, and were to anſwer only ſuch queſtions as they thought fit, and in ſuch order as was beſt in their judgments, and moſt natural to find out the truth of the accuſation, ſo that the witneſſes could not gueſs what they ſhould be aſked firſt, or laſt, nor one conjecture what the other had ſaid (which they are certain of when they know beforehand what the proſecutor will aſk in court of every of them, and what they have reſolved to anſwer) if the inqueſt ſhould put them out of their road, and then compare all their ſeveral anſwers together, they might poſſibly diſcern marks enough of falſhood, to ſhew that their teſtimonies ought not to be depended upon, where life is in queſtion.

By what is now ſaid, the reaſonableneſs of this inſtitution of ſecrecy may be diſcerned in reſpect to the diſcovery of truth, and the protection of the innocent from malicious combinations and perjuries. Yet the ſame ſecrecy of the king's council is no leſs neceſſary to reſerve the guilty for puniſhment; when the evidence againſt any party accuſed is not manifeſt and full, it may be kept without prejudice under ſecrecy until further enquiry; and if ſufficient proof can afterwards be made of the offence, an indictment may be found by a grand inqueſt, and the party brought to anſwer it. But when the examinations are in open court, or the

king's councils any other way divulged, and the evidence is weak and leſs than the law requires, it is not probable that it will be more or ſtronger, and ſhould an indictment be found, and the party tried by a petit jury, whilſt the evidence is not full, they muſt and ought to acquit him, and then the further proſecution for the ſame offence is for ever barred, though his guilt ſhould afterward be manifeſt, and confeſſed by himſelf.

From hence may certainly be concluded, that ſecrecy in the examinations and enquiries of grand juries is in all reſpects for the intereſt and advantage of the king. If he be concerned to have ſecret treaſons, felonies, and all other enormities brought to light, and that none of the offenders ſhould eſcape juſtice; if the gain of their forfeitures be thought his intereſt (which God forbid) then the firſt notices of all dangerous crimes, and wicked confederacies ought to be ſecretly and prudently purſued and ſearched into by the grand inqueſt. The accuſers and witneſſes ought not to publiſh in a court before a multitude what they pretend to know in ſuch caſes, until the diſcretion of ſo many honeſt men of the neighbourhood, hath firſt determined whether their teſtimony will amount to ſo good and full evidence that it may be made public with ſafety to the king and people in order to juſtice. Elſe they are obliged by oath to lock up in their own breaſts all the circumſtances and preſumptions of crimes, until they, or ſuch as ſhall ſucceed in the ſame truſt, ſhall have diſcovered, as they believe, evidence enough to convict the accuſed, and then, and not before, they are to accuſe the party upon record, by finding the bills, as it is uſually called. But when bills are offered without ſatisfactory evidence, and they neither know nor can learn any more, they ought, for the king's ſake, to indorſe *ignoramus* upon them, leaſt his honour and juſtice be

ſtained, by cauſing or permitting ſuch proſecution of his people in his own name, and at his ſuit, as ſhall appear upon their trial and acquital to have been frivolous, or elſe malicious deſigns upon their lives and fortunes.

If it ſhould be ſaid, that whatſoever reaſons there are for this oath of ſecrecy; yet it cannot deprive the king of the benefit of having the evidence made public, if he deſires it, and that the grand jury do not break their oaths when the king or the proſecutor for him will have it ſo. It is not hard to ſhew that ſuch notions have no foundation in law or reaſon, and ſeem to come from men who have not well ſtudied the firſt principles of the Engliſh government or of true religion.

Whoſoever hath learnt that the kings of England were ordained for the good government of the kingdom in the execution of the laws, muſt needs know, that the king cannot lawfully ſeek any other benefit in judicial proceedings, than that common right and juſtice be done to the people according to their laws and cuſtoms. Their ſafety and proſperity are to be the objects of his continual care and ſtudy, that being higheſt concern. The greatneſs and honour of a prince conſiſts in the virtue, multitude, wealth and proweſs of his people; and his greateſt glory is, by the excellence of his government ſo to have encouraged virtue and piety, that few or no criminals are to be found in his dominions. Thoſe who have made this their principal aim, have in ſome places ſo well ſucceeded, as to introduce ſuch a diſcipline and rectitude of manners, as rendered every man a law unto himſelf. As it is reported in the hiſtory of Peru *, that though the laws were ſo ſevere

* Gar. de la Veg. Hiſt. de los Incas.

as to make very ſmall crimes capital, yet it often fell out, that not one man was put to death in a year, within the whole compaſs of that vaſt empire.

The king's only benefits in finding out and puniſhing offenders by courts of juſtice are the preſervation and ſupport of the government, the protection of the innocent, revenging their wrongs, and preventing further miſchiefs by the terrors of exemplary puniſhments.

The king is the head of juſtice in the eſteem of our laws, and the whole kingdom is to expect right to be done them in his ſeveral courts, inſtituted by law for that purpoſe. Therefore, writs iſſue out in his name in all caſes where relief is ſought by the ſubjects: and the wrongs done to the lives or limbs of the people, are ſaid to be done againſt the peace of the king, his crown and dignity, reckoning it a diſhonour to him and his government, that ſubjects ſhould not, whilſt they live within the law, enjoy peace and ſecurity. It ought to be taken for a ſcandal upon the king, when he is repreſented in a court of juſtice as if he were partially concerned, or rather inclined to deſire, that a party accuſed ſhould be found guilty, than that he ſhould be declared innocent, if he be ſo in truth. Doubtleſs, the king ought to wiſh in all enquiries made after treaſons, felonies, &c. that there were none to be found in his kingdom; and that whoſoever is accuſed, might be able to anſwer ſo well and truly for himſelf, as to ſhew the accuſation to be erroneous or falſe, and to be acquitted of it. Something of this appears in the common cuſtom of England, that the clerks of the king's courts of juſtice, when any man hath pleaded not guilty to an indictment, prays forthwith that God would ſend him a good deliverance.

The deſtruction of every criminal is a loſs to a prince, and ought to be grievous to him; in the common regard of humanity, and the more particular relation of his office, and the name of father. The king's intereſt and honour is more concerned in the protection of the innocent, than in the puniſhment of the guilty. This maxim can never run them into exceſſes; for it hath ever been looked upon as a mark of great wiſdom and virtue in ſome princes and ſtates, upon ſeveral occaſions, to deſtroy all evidences againſt delinquents; and nothing is more uſual than to compoſe the moſt dangerous diſtempers of nations by acts of general amneſty, which were utterly unjuſt, if it were as great a crime to ſuffer the guilty to eſcape, as to deſtroy the innocent. We do not only find thoſe princes repreſented in hiſtory under odious characters, who have baſely murdered the innocent, but ſuch as by their ſpies and informers were too inquiſitive after the guilty; whereas none were ever blamed for clemency, or for being too gentle interpreters of the laws. Tho. Trajan was an excellent prince, endowed with all heroical virtues, yet the moſt eloquent writers, and his beſt friends, found nothing more to be praiſed in his government, than, that in his time all men might think what they pleaſed, and every man ſpeak what he thought*; and he had no better way of diſtinguiſhing himſelf from his wicked predeceſſors, than by hanging up the ſpies and informers, whom they had employed for the diſcovery of crimes. But if the puniſhment of offenders were as univerſally neceſſary as the protection of the innocent, he were as much to be abhorred as Nero; and that clemency, which is ſo highly praiſed, were to be looked upon as

* Tacit. lib. 1. Hiſt.

the worſt of vices, and thoſe who have hitherto been taken for the beſt of princes, were altogether as deteſtable as the worſt.

Moreover, all human laws were ordained for the preſervation of the innocent, and for their ſakes only are puniſhments inflicted; that thoſe of our own country do ſolely regard this, was well underſtood by Forteſcue *, who ſaith, " Indeed I could rather wiſh twenty evil doers to eſcape death through pity, than one man to be unjuſtly condemned. Such blood hath cried to heaven for vengeance againſt families and kingdoms, and their utter deſtruction hath enſued. If a criminal ſhould be acquitted by too great lenity, caution, or otherwiſe, he may be reſerved for future juſtice from man or God, if he doth not repent; but tis impoſſible that ſatisfaction or reparation ſhould be made for innocent blood ſhed in the forms of juſtice.

Without all queſtion, the king's only juſt intereſt in the evidence given againſt the party accuſed, and in the manner of taking it, is to have the truth made manifeſt, that juſtice may thereupon be done impartially. And if accuſations may be firſt examined in ſecret more ſtrictly and exactly, to prevent fraud and perjury, than is poſſible to be done in open court, as hath before appeared, then tis for the king's benefit to have it ſo. And nothing done in, or by a court, about the trial of the accuſed, is for the king, in the ſenſe of the law, unleſs it ſome way conduce to juſtice in the caſe. The witneſſes which the proſecutor brings, are no further for the king, than they tell the truth, and the whole truth, impartially; and by whomſoever any others may be called,

* Fort. de Laud. Leg. Ang. ch. 27.

upon the inquiry, or the trial to be examined, if they ſincerely deliver the truth of the matters in queſtion, they are therein the king's witneſſes, though the accuſed be acquitted by reaſon of their teſtimonies. If ſuch as are offered by the attorney general, to prove treaſon againſt any man, ſhall be found to ſwear falſly, maliciouſly, or for reward, or promiſes, though they depoſe poſitively facts of treaſon againſt the accuſed, yet they are truly and properly witneſſes againſt the king, by endeavouring to prevent juſtice and deſtroy his ſubjects. Their malice and villainy being confeſſed or proved, the king's attorney ought *(ex officio)* to proſecute them in the king's name, and at his ſuit, for their offences againſt him in ſuch depoſitions pretended to have been for him; and the legal form of the indictment ought to be for their ſwearing falſly and maliciouſly againſt the peace of the king, his crown and dignity. The proſecutors themſelves, notwithſtanding their big words, and aſſuming to themſelves to be for the king, if their proſecution ſhall be proved to be malicious, or by conſpiracy againſt the life or fortune of the accuſed, they are therein againſt the king, and ought to be indicted at the king's ſuit, for ſuch proſecutions done againſt his crown and dignity. And if an attorney general ſhould be found knowingly guilty of abetting ſuch a conſpiracy, his office could not excuſe or legally exempt him from ſuffering the villainous judgment, to the deſtruction of him and his family. Tis eſteemed, in the law, one of the moſt odious offences againſt the king, to attempt in his name to deſtroy the innocent, for whoſe protection he himſelf was ordained. Queen Elizabeth had the true ſenſe of our law *, when the lord Burleigh, upon Sir Edward Coke's

* Co. Inſt. 3d part, p. 79.

(her then attorney) coming into her preſence, told her, this is he who proſecutes *pro Domina Regina*, for our lady the queen; and ſhe ſaid, ſhe would have the form of the records altered, for it ſhould be *Attornatus Generalis qui pro Domina veritate ſequitur:* the attorney general who proſecutes for our lady the truth. Whoever is truſted in that employment, diſhonours his maſter and office, if he gives occaſion to the ſubjects to believe that his maſter ſeeks other profits or advantages by accuſations, than the common peace and welfare. He ought not to excite a jealouſy in any of their minds, that confiſcations of eſtates are deſigned or deſired by any of the king's miniſters; whoſoever makes ſuch advantages to the crown their principal aim in accuſing, are either robbers and murderers, in the ſcripture ſenſe, in ſeeking innocent blood for gain, or, in the mildeſt conſtruction, (ſuppoſing the accuſation to be on good grounds) they ſhew themſelves to be of corrupt minds, and a ſcandal to their maſter and the government. Profit or loſs of that kind, ought to have no place in judicial proceedings againſt ſuſpected criminals, but truth is only to be regarded; and for this reaſon, the judgments given in court of human inſtitution, are in ſcripture called, the judgments of God, who is the God of truth.

Yet further, if any benefit to the king could be imagined by making the evidence to the grand jury public, it could not come in competition with the law expreſſed in their oath; which, by conſtant uninterrupted uſage, for ſo many ages, hath obtained the force of law. Bracton and Britton, in their ſeveral generations, bear witneſs, that it was then practiſed; and greater proof of it need not be ſought, than the diſputes that appear by the law books to have been amongſt the ancient lawyers, whether it was treaſon or

felony for a grand jury to diſcover, either who was indicted, or what evidence was given them. The truſt of the grand juries was thought ſo ſacred in thoſe ages, and their ſecrecy of ſo great concern to the kingdom, that whoſoever ſhould break their oath therein, was by all thought worthy to die; only ſome would have them ſuffer as traitors others as felons*. And, at this day, it is held to be a high miſpriſion, puniſhable by fine and impoveriſhment. The law then having appointed the evidence to be given to grand juries in ſecret, the king cannot deſire to have it made public. He can do no wrong, ſaith the old maxim, that is, he can do nothing againſt the law, nor is any thing to be judged for his benefit that is not warranted by law. His will, commands, and deſires, are therein no otherwiſe to be known. He cannot change the legal method or manner of inquiring by juries, nor vary, in any particular caſe, from the cuſtomary and general forms of judicial proceedings; he can neither abridge nor enlarge the power of juries, no more than he can leſſen the legal power of the ſheriffs or judges, or by ſpecial directions order the one how they ſhall execute writs, and the other how they ſhall give judgments, though theſe made by himſelf.

Tis criminal, no doubt, for any to ſay, that the king deſires a court of juſtice, or a jury, to vary from the direction of the law, and they ought not to be believed therein. If letters, writs, or other commands, ſhould come to the judges for that purpoſe, they are bound by their oaths not to regard them, but to hold them for null; the ſtatutes of 2 E. III. 8. and 20 E. III. 1. are expreſs: "That if any writs, or commandments,

* Co. Inſtit. 3d part, p. 107. Rull's Indic. 771.

come to the juſtices in diſturbance of the law, or the execution of the ſame, or of right to the parties, they ſhall proceed as if no ſuch letters, writs, or commands, were come to them." And the ſubſtance of theſe, and other ſtatutes, is inſerted into the oath taken by every judge; and if they be under the moſt ſolemn and ſacred tie, in the execution of juſtice, to hold for nothing, or none, the commands of the king under the great ſeal, ſurely the word or deſire, of an attorney general, in the like caſe, ought to be leſs than nothing.

Beſides, they are ſtrangely miſtaken, who think the king can have an intereſt different from, or contrary unto that of the kingdom, in the proſecution of accuſed perſons. His concernments are involved in thoſe of his people, and he can have none diſtinct from them. He is the head of the body politic, and, the legal courſe of doing juſtice, is like the orderly circulation of the blood in the natural bodies, by which both head and body are equally preſerved, and both periſh by the interruption of it.

The king is obliged, to the utmoſt of his power, to maintain the law and juſtice in its due courſe, by his coronation oath, and the truſt thereby repoſed in him. In former ages, he was conjured not to take the crown, unleſs he reſolved punctually to obſerve it. Bromton*, and others, ſpeaking of the coronation of Richard I. deliver it thus, That having firſt taken the oath, *Deinde indutus Mantello, ductus eſt ad altare, & conjuratus ab Archiepiſcopo, & prohibitus ex parte Dei, ne hunc honorem ſibi aſſumat, niſi in mente habeat tenere ſacramenta & vota quæ ſuperius fecit. Et ipſe reſpondit, ſe per Dei auxilium*

* Brom. p. 1159. Mat. Paris, p. 153. Hoved. p. 374. Baker p. 68.

omnia ſupradicta obſervaturum bona fide. Deinde cepit coronam de altari, & tradidit eam Archiepiſcopo, qui poſuit eam ſuper caput Regis, & ſic coronatus Rex, ductus eſt ad ſedem ſuam. Afterwards cloathed with the royal robe, he is led to the altar, and conjured by the archbiſhop, and forbid in the name of God, not to aſſume that honour, unleſs he intended to keep the oaths and vows he had before made; and he anſwered, by God's help, he would faithfully obſerve all the promiſes. And then he took the crown from off the altar, and delivered it to the archbiſhop, who put it upon the king's head; and the king thus crowned is led unto his ſeat. The violation of which truſt, cannot but be as well a wound unto their conſciences, as bring great prejudice upon their perſons and affairs.

The common law that exacts this, doth ſo far provide for princes, that having their minds free from cares of preſerving themſelves, they may reſt aſſured, that no acts, words or deſigns, that may bring them into danger, can be concealed from the many hundreds of men, who by the law are appointed in all parts of the kingdom, watchfully to take care of the king; and are ſo far concerned in his ſafety, that they can hope no longer to enjoy their own lives and fortunes in peace, than they can preſerve him, and the good order, which according to the laws he is to uphold.

It is the joint intereſt of king and people that the ancient rules of doing juſtice be held ſacred and inviolable; and they are equally concerned in cauſing ſtrict inquiries to be made into all evidences given againſt ſuſpected, or accuſed perſons, that the truth may be diſcovered; and ſuch as dare to diſturb the publick peace by breaking the laws, may be brought to puniſhment. And the whole courſe of judicial pro-

ceedings in criminal cauſes, ſhews that the people is therein equally concerned with the king, whoſe name is uſed. This is the ground of that diſtinction which Sir Ed. Coke makes between the proceedings in pleas of the crown, and actions for wrongs done to the king himſelf: "In pleas of the crown, or other common offences, nuiſances, &c. principally concerning others, or the publick, there the king by law muſt be apprized by indictment, preſentment, or other matter of record; but the king may have an action for ſuch wrong as is done to himſelf, and whereof none other can have an action but the king, without being apprized by indictment, preſentment, or other matter of record, as a *Quare impedit*, *Quare incumbravit*, a writ of attaint, of debt, detinue of ward, eſcheat, *ſcire, fac. pur repealer patent*, &c.*" unto which every man muſt anſwer: but no man can be brought to anſwer for public crimes at the king's ſuit otherwiſe than by indictment of a grand jury.

The whole courſe of doing juſtice upon criminals, from the beginning of the proceſs, unto the execution of the ſentence, is, and ever was eſteemed to be the kingdom's concernment, as is evidenced by the frequent complaints made in parliament, that capital offenders were pardoned to the peoples damage and wrong. In the 13 Rich. II. it is ſaid, that the king hearing the grievous complaints of his commons in parliament, of the outrageous miſchiefs which happened unto the realm, for that treaſons, murders, and rapes of women, be commonly done, and committed, and the more becauſe charters of pardon had been eaſily granted in ſuch caſes; and thereupon it was enacted, that no pardon

* Co. 3d. Inſt. pag. 136.

for ſuch crimes ſhould be granted, unleſs the ſame were particularly ſpecified therein, and that if a pardon were otherwiſe granted for the death of a man, the judges ſhould, notwithſtanding, enquire by a grand jury of the neighbourhood, concerning the death of every ſuch perſon, and if he were found to have been wilfully murdered, ſuch charter of pardon to be diſallowed; and proviſions were made by impoſing grievous fines upon every perſon, according to his degree and quality, or impriſonment, who ſhould preſume to ſue to the king for any pardons of the aforeſaid crimes, and that ſuch perſons might be known to the whole kingdom, their names were to be upon ſeveral records. The like had been done in many ſtatutes made by ſeveral parliaments, as in the 6 Ed. I. 9, the 2 Ed. III. 2, the 10 Ed. III. 2, and the 14 Ed. III. 15, wherein it was acknowledged by the king in parliament, "That the oath of the crown had not been kept, by reaſon of the grant of pardons contrary to the aforeſaid ſtatutes; and enacted that any ſuch charter of pardon, from thenceforth granted againſt the oath of his crown and the ſaid ſtatutes, the ſame ſhould be holden for none." In the 27 Edw. III. 2, It is further provided for preventing the peoples damage by ſuch pardons, "That from thenceforth in every charter of pardon of felony, which ſhall be granted at any man's ſuggeſtion, the ſaid ſuggeſtion, and the name of him that maketh the ſuggeſtion, ſhall be comprized in the ſame charter, and if after the ſame ſuggeſtion be found untrue, the charter ſhall be diſallowed and holden for none: And the juſtices, before whom ſuch charter ſhall be alledged, ſhall enquire of the ſame ſuggeſtion, and that as well of charters granted before this time, as of charters which ſhall be granted in time to come, and if they find them

untrue, then they ſhall diſallow the charter ſo alledged, and ſhall moreover do as the law demandeth.

Thus have parliaments from time to time declared, that the offences againſt the crown are againſt the publick welfare, and that kings are obliged by their oath and office to cauſe juſtice to be done upon traitors and felons for the kingdom's ſake, according to the ancient common law, declared by Magna Charta, in theſe words: *Nulli negabimus, nulli vendemus, nulli differemus juſtitiam**. We will ſell to no man, we will not deny, or defer, to any man either juſtice or right.

And as the publick is concerned, that the due and legal methods be obſerved in the proſecution of offenders, ſo likewiſe doth the ſecurity of every ſingle man in the nation depend upon it. No man can aſſure himſelf he ſhall not be accuſed of the higheſt crimes. Let a man's innocence and prudence be what it will, yet his moſt inoffenſive words and actions are liable to be miſconſtrued, and he may, by ſubornation and conſpiracy, have things laid to his charge, of which he is no ways guilty. Who can ſpeak or carry himſelf with that circumſpection, as not to have his harmleſs words or actions wreſted to another ſenſe than he intended? Who can be ſecure from having a paper put into his pockets, or laid in his houſe, of which he ſhall know nothing till his accuſation? Hiſtory affords many examples of the deſtable practices in this kind of wicked court parafites, among which one may ſuffice for inſtance, out of Polybius†, an approved author. Hermes, a powerful favourite, under Antiochus the younger, but a man-

* 9 Hen. III. 29.

† Polyb. lib. 5.

noted to be a favourer of liars, was made uſe of againſt the innocent and brave Epigenes. He had long watched to kill him, for that he found him a man of great eloquence and valour, having alſo favour and authority with the king. He had unjuſtly, but unſucceſsfully, accuſed him of treaſon, by falſe gloſſes put upon his faithful advice given to the king in open council; this not prevailing, he by artifice got him put out of his command, and to retire from court; which done, he laid a plot againſt him, with the help and counſel of (one of his accomplices) Alexis, and writing letters as if they had been ſent from Molon, (who was then in open rebellion againſt his prince for fear, amongſt other reaſons, of the cruelty and treachery of Hermes) and corrupted one of Alexis's ſervants with great promiſes, who went to Epigenes, to thruſt the letters ſecretly amongſt his other writings, which when he had done, Alexis came ſuddenly to Epigenes, demanding of him, if he had received any letter from Molon: and when he ſaid he had none, the other ſaid, he was confident he ſhould find ſome; wherefore, entering the houſe to ſearch, he found the letters, and taking this occaſion, ſlew him, [leſt if the fact had been duly examined, the conſpiracy had been diſcovered.] Theſe things happening thus, the king thought that he was juſtly ſlain; in this manner the worthy Epigenes ended his days: But this great man's deſigns did not reſt here; for within a while heightened with ſucceſs, he ſo arrogantly abuſed his maſter's authority, as he grew dangerous to the king himſelf, as well as to thoſe about him; inſomuch as Antiochus was forced for that he hated and feared Hermes, to take away his life by ſtratagem, thereby to ſecure himſelf. By theſe, and a thouſand other ways, the moſt unblemiſhed innocence may be brought into the greateſt dangers. Since then every man is thus eaſily ſubject to queſtion, and what is one

man's caſe this day, may be another man's to morrow, it is undoubtedly every man's concern, to ſee, as far as in him lies, in every caſe, that the accuſed perſon may have the benefit of all ſuch proviſions, as the law hath made for the defence of innocence and reputation.

Now to this end there is nothing ſo neceſſary as the ſecret and ſeparate examination of witneſſes, for though perhaps, as hath been already obſerved, it may be no very difficult thing for ſeveral perſons, who are permitted to diſcourſe with each other freely, and to hear, or be told what each of their fellows had been aſked and anſwered, to agree in one ſtory, eſpecially if the jury may not aſk what queſtions they ſhall think fit for the ſatisfaction of their own conſciences; but that they ſhall be ſo far under the correction and cenſure of the judges, as to have the queſtions which they put, called by them trifles, impertinent, and unfit for the witneſſes to ſpeak to; yet if they be examined apart, with that due care of ſifting out all the circumſtances which the law requires, where every man of the jury is at full liberty to enquire into any thing for his clearer information, and that with what deliberation they think fit, and all this be done with that ſecrecy which the law commands; it will be almoſt impoſſible for a man to ſuffer under a falſe accuſation.

Nor has the law been leſs careful for the reputation of the ſubjects of England, than for their lives and eſtates, and this ſeems to be one reaſon why in criminal caſes, a man ſhall not be brought to an open legal trial by a petit jury, till the grand jury have firſt found the bill: The law having entruſted the grand inqueſt in a ſpecial manner with their good names; they are therefore not only to enquire whether the fact that is laid, was done by the party accuſed, but into the circum-

ſtances thereof too, whether it were done traiterouſly, felonioufly, or maliciouſly, &c. according to the manner charged, which circumſtances are not barely matter of form, but do conſtitute the very eſſence of the crime; and laſtly into the credit of the witneſſes, and that of the party accuſed, and unleſs they find both the fact proved upon him, and ſtrong preſumptions of ſuch aggravating circumſtances attending it, as the law requires in the ſpecification of ſuch crime, and likewiſe are ſatisfied in the credibility of the witneſſes; they ought not to expoſe the ſubject to an open trial in the face of the county, to a certain loſs of his reputation, and hazard of his life and eſtate. Moreover ſhould this practice of publick examination prevail, and the jurors oath of ſecrecy continue, how partial and unequal a thing would it be to declare that to all the world, which will blaſt a man's good name, and religiouſly conceal what they may know tending to his juſtification. To examine witneſſes, perhaps ſuborned, certainly prepared, and have evidence dreſſed up with all the advantages that lawyers wits can give it, of the the fouleſt crimes a man can be guilty of, and this given before ſome thouſands againſt him; and yet for the ſame court to ſwear thoſe, whom the law makes judges in the caſe, not to reveal one word of thoſe reaſons, which have ſatisfied their conſciences of his innocence. What is this, but an artifice of ſlandering men (it may be) of the moſt unſpotted converſation, and of abuſing authority, not ſo much to find men guilty, as to make them infamous? after this ignominy is fixed, what judgment can the auditors, and from them the world, make, but of high probality of guilt in the party accuſed, and perjury in the jury.

This courſe, if it ſhould be continued, muſt needs be of moſt dangerous conſequence to all ſorts of men;

it will both ſubject every one, without relief to be defamed, and affright the beſt and moſt conſcientious men, from ſerving on grand juries, which is a moſt neceſſary part of their duty. Now ſince there is in our government, (as in every one that is well conſtituted there ought to be) great liberty of accuſation, that no man may be encouraged to do ill through hopes of impunity, if, by this means, a method be opened for the blaſting the moſt innocent man's honour, and deterring the moſt honeſt from being his judges, what remains, but that every man's reputation, which is moſt dear unto ſuch as are good, is held precariouſly, and it will be in the power of great men to pervert the laws, and take away whoſe life and eſtate they pleaſe, or, at leaſt, to faſten imputations of the moſt deteſted crimes upon any, whom, for ſecret reaſons, they have a mind to defame. The conſequences of which ſcandal, as they are very miſchievous to every man, ſo in a trading country in a more eſpecial manner, to all who live by any vocation of that kind.

The greateſt part of trade is driven upon credit, moſt men of any conſiderable employment dealing for much more than they are truly worth, and every man's credit depends as well upon his behaviour to the government he lives under, as upon his private honeſty in his tranſactions between man and man; ſo that the ſuſpicion only of his being obnoxious to the government, is enough to ſet all his creditors upon his back, and put a ſtop to all his affairs, perhaps to his utter ruin. What expedition and violence will they all uſe to recover their debts, when he ſhall be publickly charged with ſuch crimes as forfeit life and eſtate? Though there ſhould not be one word of the accuſation true, yet they knowing the charge, and the ſeeming proofs in the court, and the conſequences of it, and

not being acquainted with the truth, as it appears to the jury, ſelf-intereſt will make his creditors to draw in their effects, which is no more than a new contrivance, under colour of law, of undoing honeſt men.

If to prevent any of theſe miſchiefs, the jury ſhould diſcover their fellows and their own counſel, as the court by publick examination doth, it would not only be a wilful breach of their oath, but a betraying of the truſt which the law has repoſed in them, for the ſecurity of the ſubject. For to ſubject the reaſons of their verdicts upon bills to the cenſure of the judges, were to diveſt themſelves of the power which the law has given them, for moſt important conſiderations, without account or controul, and to intereſt thoſe in it, whom the law has not in this caſe truſted, and ſo by degrees, the courſe of juſtice, in one of the moſt material parts, may be changed, and a fundamental ſecurity of our liberty and property inſenſibly loſt. On the other hand, if, for fear of being unworthily reproached as *ignoramus* jury-men, obſtinate fellows, that obſtruct juſtice, and diſſerve the king, the grand jury ſhall ſuffer the judges, or the king's counſel, to prevail with them to indorſe *billa vera*, when their conſciences are not ſatisfied in the truth of the accuſation, they act directly againſt their oaths, oppreſs the innocent whom they ought to protect, as far as in them lies, ſubject their country, themſelves, and poſterity, to arbitrary powers, pervert the adminiſtration of juſtice, and overthrow the government, which is inſtituted for the obtaining it, and ſubſiſts by it.

This ſeems to be the greateſt treaſon that can be committed againſt the whole kingdom, and threatens ruin unto every man in private in it. None can be ſafe againſt authoriſed malice, and notwithſtanding the

care of our anceſtors, rapine, murder, and the worſt of crimes, may be advanced by the formality of verdicts, if grand juries be overawed, or not ſuffered to enquire into the truth, to the ſatisfaction of their conſciences. Every man, whilſt he lives innocently, doth, under God, place his hopes of ſecurity in the law, which can give no protection, if its due courſe be ſo interrupted, that frauds cannot be diſcovered. Witneſſes may as well favour offenders, as give falſe teſtimony againſt the guiltleſs, and if they, by hearing what each other ſay, are put into a way of concealing their villainous deſigns, there can be no legal revenge of the crimes already committed. Others, by their impunity, will be encouraged to do the like, and every quiet mind will be equally expoſed unto private injuries, and ſuch as may be done unto him under the colour of law. No man can promiſe unto himſelf any ſecurity for his life or goods, and they who do not ſuffer the utmoſt violences in their own perſons, may do it in their children, friends, and neareſt relations, if he be deprived of the remedies that the law ordains, and forced to depend upon the will of a judge, who may be (and perhaps we may ſay) are too often corrupted, or ſwayed by their own paſſions, intereſts, or the impulſe of ſuch as are greater than they. This miſchief is aggravated by a commonly received opinion, that whoſoever ſpeaks againſt an accuſed perſon is the king's witneſs, and the worſt of men, in their worſt deſigns, do uſually ſhelter themſelves under that name, whereas, he only is the king's witneſs, who ſpeaks the truth, whether it be for or againſt him that is accuſed. As the power of the king is the power of the law, he can have no other intention than that of the law, which is to have juſtice impartially adminiſtered: and as he is the father of his people, he cannot but incline ever to the gentleſt ſide, unleſs it be poſſible for a father to delight in the de-

ſtruction, or deſire to enrich himſelf by the confiſcation of his children's eſtates. If the moſt wicked princes have had different thoughts, they have been obliged to diſſemble them. We know of none worſe than Nero, but he was ſo far from acknowledging that he deſired any man's condemnation, that he looked upon the neceſſity of ſigning warrants for the execution of malefactors, as a burthen*, and rather wiſhed he had not learnt to write, than to be obliged to do it. They, who by ſpreading ſuch barbarous errors, would create unto the king an intereſt different from that of his people, which he is to preſerve, whilſt they pretend to ſerve him in deſtroying of them, they deprive him of his honour and dignity; juſtice is done in all places in the name of the chief magiſtrate, it being preſumed, that he doth embrace every one of his ſubjects with equal tenderneſs, until the guilty are by legal proofs diſcriminated from the innocent; and amongſt us the king's name may be uſed in civil caſes, as well as criminal; but it is as impoſſible for him rightly to deſire I ſhould be condemned for killing a man whom I have not killed, or a treaſon that I have not committed, as that my land ſhould be unjuſtly taken from me, by a judgment in his bench, or I ſhould be condemned to pay a debt that I do not owe.

In both caſes we ſue unto him for juſtice, and demand it as our right. We are all concerned in it, publickly and privately, and the king, as well as all the officers of juſtice, are, by their ſeveral oaths, obliged in their reſpective capacities to perform it. They are bound to give their aſſiſtance to find out offenders, and

* Sne. Vit. Ner. utinam neſcirem literas.

the king's attorney is by his oath to profecute them, if he be required; and he is not only the king's ſervant in ſuch caſes, but the nation's; or rather, cannot otherwiſe ſerve the king, than by ſeeing juſtice done in the nation. Whenever any man receives an injury in his perſon, wife, children, friends, or goods, the king is injured, inaſmuch as he is by his office to prevent ſuch miſchief, and ought to be concerned in the welfare of every one of his ſubjects; but the parties to whom the injuries are done, are the immediate ſufferers, and the proſecution is principally made, that they may be repared or revenged, and other innocent perſons ſecured by the puniſhment of offenders, in which the king can be no otherwiſe concerned, than as he is to ſee his office faithfully performed, and his people protected. The king's ſuit therefore is in the behalf of his people, yet the laws leave unto every man a liberty, in caſe of treaſons, murders, rapes, robberies, &c. to ſue in the king's name, and crave his aid, or, by way of appeal, in his own. The ſame law looks upon felons or traitors as publick enemies, and by authoriſing every one to purſue or apprehend them, teacheth us, that every man, in his place, ought to do it. The ſame act whereby one, or a few are injured, threateneth all, and every man's private intereſt ſo concurs with that of the publick, that all depends upon the exact preſervation of the method preſcribed by the law, for the impartial inquiſition after ſuſpected offenders, and moſt tender care of preſerving ſuch as are innocent. As this cannot poſſibly be effected without ſecret and ſeparate examinations, the forbiding of them is no leſs, than to change the courſe which is enjoined by law, confirmed by cuſtom, and grounded upon reaſon and juſtice. If, on the other ſide, any man believes, that ſuch as in the king's name proſecute ſuſpected delinquents, ought only to try how they may bring them to be condemned, he may be

pleaſed to conſider, that all ſuch perſons ought, according unto law, to produce no witneſs whom they do not think to be true, no evidence which they do not believe good, nor can conceal any thing that may juſtify the accuſed. No trick or artifice can be lawfully uſed to deceive a grand jury, or induce them to find or reject a bill, otherwiſe than as they are led by their own conſciences. All lawyers were anciently ſworn to put no deceit upon the courts for their clients ſake, and there are ſtatutes ſtill in force to puniſh them, if they do it; but there is an eternal obligation upon ſuch as are of counſel againſt perſons accuſed of crimes, not to uſe ſuch arts as may bring the innocent to be condemned, and thereby pervert that which is not called the judgment of man, but of God; becauſe man renders it in the ſtead, and by the commandment of God; ſuch practices exalt the juriſdiction of tribunals, but infect and pollute them with that innocent blood which will be their overthrow. And leaſt of all, can it be called a ſervice to the king, ſince none could ever ſtand againſt the cry of it. This is neceſſarily implied in the attorney general's oath, to ſerve the king in his kingly office, wherein the law preſumes he can do no wrong. But the greateſt of all wrongs, and that which hath been moſt deſtructive unto thrones, is by fraud to circumvent and deſtroy the innocent. This is to turn a legal king into a Nimrod, a hunter of men; this is not to act the part of a father or a ſhepherd, who is ready to lay down his life for his ſheep, but ſuch as the Pſalmiſt complains of, who eat up the people as if they eat bread. Jezebel did perhaps applaud her own wit, and think ſhe had done a great ſervice to the king, by finding out men of Belial, judges, and witneſſes, to bring Naboth to be ſtoned; but that unregarded blood was a canker, or the plague of leproſy in his throne and family, which could not be cured but by its overthrow and extinction.

But if the attorney general cannot ſerve the king by abuſing juries, and ſubverting the innocent, he can as little gain an advantage to himſelf by falſifying his oath, by the true meaning whereof he is to proſecute juſtice impartially, and the eternal divine law would annul any oath or promiſe that he ſhould have taken to the contrary, even though his office had obliged him unto it.

The like obligation lies upon jurors not to ſuffer themſelves to be deluded, or perſuaded, that the judges, king's counſel, or any others, can diſpenſe with that oath, or any part of it, which they have taken before God unto the whole nation; nor to think that they can ſwerve from the rules ſet by the law, without a damnable breach of it. The power of relating, or diſſolving conſcientious obligations, acknowledged in the pope, makes a great part of the Roman ſuperſtition; and that grand impoſtor could never corrupt kingdoms and nations to their deſtruction, and the eſtabliſhment of his tyranny, until he had brought them to believe he could diſpenſe with oaths, taken by kings unto their ſubjects, and by ſubjects to their kings; nor impoſe ſo extravagant an error upon either, until he had perſuaded them he was in the place of God. It is hard to ſay, how the judges or king's counſel can have the ſame power, unleſs it be upon the ſame title; but we may be ſure they may as well diſpenſe with the whole oath as any part of it, and can have no pretence unto either, unleſs they have the keys of heaven and hell in their keeping. It is in vain to ſay, the king, as any other man, may remit the oath taken unto and for himſelf; he is not a party for himſelf, but in the behalf of his people, and cannot diſpoſe of their concernments without their conſent, which is given only in parliament.

The king's counſel ought to remember, they are, in criminal caſes, of counſel unto every man in the kingdom. It is no ways referred unto the direction of the judges, or unto them, whether that ſecrecy enjoined by law, be profitable unto the king or kingdom; they muſt take the law as it is, and render obedience unto it, until it be altered by the power that made it. To this end, the judges, by acts of parliament, viz. 18 Ed. III. cap. 8. and 20 Ed. III. cap. 1. are ſworn to ſerve the people: "Ye ſhall ſerve our lord the king and his people in the office of juſtice, &c. Ye ſhall deny to no man common right by the king's letters, nor no other man's, nor for any other cauſe; and in default thereof, in any point, they are to forfeit their bodies, lands, and goods." This proves them to be the people's ſervants as well as the king's.

Further, by the expreſs words of the commiſſions of Oyer and Terminer, they are required to "aſſiſt every man that ſuffers injury, and make diligent inquiſition after all manner of falſhoods, deceits, offences, and wrongs done to any man, and thereupon to do juſtice according to the law." So, that in the whole proceedings in order unto trial, and in the trials themſelves, the thing principally intended, which ſeveral perſons are ſeverally, in their capacities, obliged to purſue, is the diſcovery of the truth. The witneſſes are to depoſe "the truth, the whole truth, and nothing but the truth;" thereupon the counſel for the king are to proſecute; the grand jury to preſent; and the petit jury to try. Theſe are ſeveral offices, but all to the ſame end. Tis not the priſoner, but the crime, that is to be purſued; this primarily, the offender but by conſequence; and therefore ſuch courſes muſt be taken, as may diſcover that, and not ſuch as may enſnare him. When the offence is found, the impartial letter of the

law gives the doom, and the judges have no ſhare in it, but the pronouncing of it. Till then the judges are only to preſide, and take care that every man elſe, who is employed in this neceſſary affair, do his duty according to law. So that upon reſult of the whole tranſaction, impartial juſtice may be done, either to the acquittal or condemnation of the priſoner.

Hereby it is manifeſt why the judges are obliged by oath, to "Serve the people as well as the king." And by commiſſion, to "Serve every one that ſuffers injuries." As they are to ſee that right be done to the king, and his injured ſubjects, in diſcovering of the delinquent, ſo they are to be of counſel with the priſoner, whom the law ſuppoſeth may be ignorant as well as innocent; and therefore has provided, that the court ſhall be of counſel for him, and as well inform him of what legal advantages the law allows him, as to reſolve any point of law, when he ſhall propoſe it to them. And it ſeems to be upon the preſumption of this ſteady impartiality in the judges, (thus obliged by all that is held ſacred before God and man, to be unbiaſſed) that the priſoner hath no counſel; for if the court faithfully perform their duty, the accuſed can have no wrong or hardſhip, and therefore needs no adviſer.

Now ſuppoſe a man perfectly innocent, and in ſome meaſure knowing in the law, ſhould be accuſed of treaſon or felony; if the judges ſhall deny unto the grand jury the liberty of examining any witneſſes, except in open court, where nothing ſhall be offered that may help to clear the priſoner, but every thing aggravated, that gives colour for the accuſation, ſuch perſons only produced, as the king's counſel, or the proſecutor's ſhall think fit to call, of whoſe credit alſo the jury muſt not enquire, but ſhall be controled and brow-beaten

in aſking queſtions, of ſuch unknown witneſſes, for their own ſatisfaction, if they have any tendency to diſcover the infamy of theſe witneſſes, or the falſhood of their teſtimony, how can innocence ſecure any man from being arraigned?

And if the oath of the judges ſhould be as much forgotten in the further proceedings upon the trial, where, in caſes of treaſon, the priſoner ſhall have all the king's counſel, (commonly not the moſt unlearned) prepared with ſtudied ſpeeches and arguments, to make him black and odious, and to ſtrain all his words, and to alledge them for inſtances of his guilt. If then all his private papers and notes, to help his memory in his plea and defence, ſhall be taken from him by the gaoler, or the court, and given to his proſecutors; and all advice and aſſiſtance from councils or friends, and his neareſt relations ſhall be denied him, and none ſuffered by word or writing to inform him of the indifferency, or honeſty, or the partiality or malice of the pannels returned (whom the law allows him to challenge or refuſe, either peremptorily, or for good reaſons offered) ſhould he be thus deprived of all the good proviſions of the law for his ſafety, to what frauds, perjuries, and ſubornations is not he, and every man expoſed, who may be accuſed? What deceits may there not be put upon juries? and what probability is there of finding ſecurity in innocence? What an admirable execution would this be of their commiſſion, "To make diligent inquiſition after all manner of falſhoods, deceits, wrongs, and frauds, and thereupon to do juſtice according to law?" when at the ſame time, if ſo managed, a method would be introduced of ruining and deſtroying any man in the form of juſtice. Such practices would be the higheſt diſhonour to the king imaginable, whoſe name is uſed, and ſo far miſrepreſent the kingly office

as to make that appear to have been erected to vex and deſtroy the people, which was intended and ordained to help and preſerve them.

The law ſo far abhors ſuch proceedings, that it intends, that every man ſhould be ſtrictly bound, to be exactly juſt, in their ſeveral employments, relating to the execution of juſtice. The ſergeants of the king's council (ſir George Jeffrys, among the reſt) who proſecute in the king's name, and are conſulted in the forming bills of indictment, and advice about the witneſſes, and their teſtimonies againſt the accuſed; theſe, if they would remember it, when they are made ſergeants, take an oath, *Coke's 2d Inſtitutes*, p. 214, "as well and truly to ſerve the people" (whereof the party accuſed is one) "as the king himſelf, and to miniſter the king's matters duly and truly after the courſe of the law to their cunning;" Not to uſe their cunning and craft to hide the truth and deſtroy the accuſed if they can.

They are alſo obliged by the ſtatute of Weſtm. 1. cap. 29. to put no manner of deceit or colluſion upon the king's court, nor ſecretly to conſent to any ſuch tricks as may abuſe or beguile the court, or the party, be it in cauſes civil or criminal: and it is ordained that if any of them be convicted of ſuch practices, he ſhall be impriſoned for a year, and never be heard to plead again in any court; and if the miſchevious conſequence of their treacheries be great, they are ſubject to further and greater puniſhments. Our ancient law book, called the *Mirror of Juſtice*, cap. 2. ſect. 4. ſays, "That every ſergeant pleader is chargeable by his oath, not to maintain or defend any wrong or falſhood to his knowledge, but ſhall leave his client when he ſhall perceive the wrong intended by him: alſo that he ſhall not move

or proffer any falſe teſtimony, nor conſent to any lyes, deceits, or corruptions whatſoever, in his pleadings."

As a further ſecurity unto the people againſt all attempts upon their laws, exemplary juſtice hath been done, in ſeveral ages, upon ſuch judges, and juſticiaries, as through corruption, ſubmiſſion unto unjuſt commands, or any other ſiniſter conſideration, have dared to ſwerve from them: The puniſhments of theſe wicked men remain upon record, as monuments of their infamy to be a terror unto all that ſhall ſucceed them. In the reign of the Saxons, the moſt notable example was given by king Alfred, who cauſed above forty judges to be hanged in a ſhort ſpace, for ſeveral wrongs done to the people, as is related in the Mirror of Juſtice: Some of them ſuffered for impoſing upon juries, and forcing them to give verdicts according to their will; and one, as it ſeems, had taken the confidence to examine a jury, that he might find which of them would ſubmit to his will, and ſetting aſide him who would not, condemned a man upon the verdict of eleven.

Since the coming in of the Normans, our parliaments have not been leſs ſevere againſt ſuch judges, as have ſuffered the courſe of juſtice to be perverted, or the rights and liberties of the people to be invaded. In the time of Edward I. Anno. 1289, the parliament finding, that all the judges, except two, had ſwerved from their duty, condemned them to ſeveral puniſhments according unto their crimes*, as baniſhment, perpetual impriſonment, or the loſs of all their eſtates, &c. Their particular offences are ſpecified in a ſpeech

* Ex Chron. Anno. 10 Ed. I.

made by the archbiſhop of Canterbury in parliament. They had broken Magna Charta; incited the king againſt his people; violated the laws under pretence of expounding them; and impudently preſumed to prefer their own councils to the king, before the advices of parliament, as appears by the ſpeech, &c. hereunto annexed.

The like was done in the time of Ed. II. when Hugh de Spencer was charged for having prevailed with the king to break his oath to the people, in doing things againſt the law by his own authority.

In the time of Ed. III. judge Thorpe was hanged, for having, in the like manner, brought the king to break his oath *; and the happy reign of that great king affords many inſtances of the like nature; amongſt which, the puniſhment of Sir Henry Green and Sir William Skipwith, deſerve to be obſerved, and put into an equal rank with thoſe of his brave and victorious grandfather.

In the time of Richard II.† eleven of the judges, forgetting the dreadful puniſhments of their predeceſſors, ſubſcribed malicious indictments againſt law, and gave falſe interpretations of our ancient laws to the king, thereby to bring many of his moſt eminent and worthy ſubjects to ſuffer as traitors at his will; ſubjected the authority and very being of parliaments to his abſolute pleaſure, and made him believe, that all the laws lay in his own breaſt. Hereupon ſentence of

* Dan. Hiſtory, p. 260, 261.

† See all the Engliſh Hiſtories of Walſingham, Fabian, Speed, &c. in the 11th and 21ſt Years of Richard II.

death was paſſed upon them; and though, upon their repentance, and confeſſing they had been ſwayed by fear and threatenings from the king, two only were executed, all the others were for ever baniſhed, as unworthy to enjoy the benefit of that law, which they had ſo perfidiouſly and baſely betrayed.

It were an endleſs work to recite all the examples of this kind that are found in our hiſtories and records; but that of Empſon and Dudley muſt not be omitted. They had craftily contrived to aboliſh grand juries, and to draw the lives and eſtates of the people into queſtion, without indictments by them; and by ſurpriſe, and other wicked practices, they gained an act of parliament for their countenance. Hereupon falſe accuſations followed without number; oppreſſion and injuſtice broke forth like a flood, and to gain the king's favour they filled his coffers. The indictments againſt them, mentioned in *Anderſon's Reports*, page 156, 157, are worth reading; whereby they are charged "with treaſon, for ſubverting the laws and cuſtoms of the land, in their proceedings without grand juries, and procuring the murmuring and hatred of the people againſt the king, to the great danger of him and the kingdom." Nothing could ſatisfy the kingdom, though the king was dead whom they had flattered and ſerved, but ſuch juſtice done upon them, and many of their inſtruments and officers, as may for ever make the ears of judges to tingle.

And it is not to be forgotten, that the judges in queen Elizabeth's time, in the caſe of R. Cavendiſh, in *Anderſon's Reports*, page 152, and 155, were, (as they told the queen and her counſellors) by the puniſhment of former judges eſpecially of Empſon and Dudley, deterred from obeying her illegal commands. The queen had ſent ſeveral letters

under her ſignet; great men preſſed them to obey her patent under the great ſeal, and the reaſons of their diſobedience being required, they anſwered, "That the queen herſelf, and the judges alſo, had taken an oath to keep the laws; and if they ſhould obey her commands, the laws would not warrant them, and they ſhould therein break their oath, to the offence of God and their country, and the commonwealth wherein they were born. And, ſay they, if we had no fear of God, yet the examples, and puniſhments of others before us, who did offend the laws, do remember, and recal us from the like offences.

Whoſoever, being in the like places, may deſign, or be put upon the like practices, will do well to conſider theſe examples, and not to think, that he, who obliquely endeavours to render grand juries uſeleſs, is leſs criminal, than he that would abſolutely aboliſh them. That which doth not act according to its inſtitution, is, as if it were not in being; and, whoever doth, without prejudice, conſider this matter, will ſee that it is not leſs pernicious to deny juries the uſe of thoſe methods of diſcovering the truth which the law hath appointed, and ſo by degrees turn them into a mere matter of form, than openly and avowedly to deſtroy them. Surely ſuch a gradual method of deſtroying our native right is the moſt dangerous in its conſequence. The ſafety, which our forefathers, for many hundreds of years, enjoyed under this part of the law eſpecially, and have tranſmitted to us, is ſo apparent to the meaneſt capacity, that whoever ſhall go about to take it away, or give it up, is like to meet with the fate of Iſhmael, to have every man's hand againſt him, becauſe his is againſt every man. Artifices of this kind will ruin us more ſilently, and ſo with leſs oppoſition, and yet as certainly as the other more moved

oppreſſion. This only is the difference, that one way we ſhould be ſlaves immediately, and the other inſenſibly; but with this further diſadvantage too, that our ſlavery ſhould be the more unavoidable, and the faſter riveted upon us, becauſe it would be under colour of law, which practice in time would obtain.

Few men at firſt ſee the danger of little changes in fundamentals, and thoſe who deſign them, uſually act with ſo much craft, as beſides the giving ſpecious reaſons, they take great care that the true reaſon ſhall not appear. Every deſign, therefore, of changing the conſtitution, ought to be moſt warily obſerved, and timely oppoſed; nor is it only the intereſt of the people, that ſuch fundamentals ſhould be duly guarded, for whoſe benefit they were ſo carefully laid, and whom the judges are ſworn to ſerve, but of the king too, for whoſe ſake thoſe pretend to act who would ſubvert them.

Our kings, as well as judges, are ſworn to maintain the laws. They have themſelves, in ſeveral ſtatutes, required the judges, at their peril, to adminiſter equal juſtice to every man, notwithſtanding any letters or commands, &c. even from themſelves, to the contrary; and, when any failure hath been, the greateſt, and moſt powerful of them, have ever been the readieſt to give redreſs. It appears, by the preface to the Statutes of 20 Ed. III. that the judicial proceedings had been perverted; that letters, writs, and commands, had been ſent from the king and great men to the juſtices; and that perſons, belonging to the court of the king, the queen, the prince of Wales, had maintained and abetted quarrels, &c. whereby the laws had been violated, and many wrongs done. But the king was ſo far from juſtifying his own letters, or thoſe illegal practices, that

the preamble of thoſe ſtatutes ſaith, they were made for the relief of the people, in their ſufferings by them. That brave king, in the height of his glory and vigour of his age, choſe rather to confeſs his error, than to continue in it, as is evident by his own words: "Edward, by the Grace of God, &c. Becauſe by divers complaints made unto us, we have perceived that the law of the land, which we by our oath are bound to maintain, is the leſs well kept, and execution of the ſame diſturbed many times by maintenances and procurements, as well in the court as the country, We, greatly moved of conſcience in this matter, and for this cauſe, deſiring as much for the pleaſure of God, and eaſe and quietneſs of our ſubjects, as to ſave our conſcience, and for to ſave and keep our ſaid oath, by the aſſent, &c. enact, That judges ſhall do juſtice, notwithſtanding writs, letters, or commands, from himſelf, &c. and that none of the king's houſe, or belonging to the king, queen, or prince of Wales, do maintain quarrels, &c."

King James, in his ſpeech to the judges in the Star-chamber, Anno. 1616, told them, "That he had, after many years, reſolved to renew his oath, made at his coronation, concerning juſtice and the promiſe therein contained for maintaining the law of the land." And in the next page ſave one, ſays, "I was ſworn to maintain the law of the land, and therefore had been perjured, if I had broken it; God is my judge I never intended it." And his majeſty, that now is, hath made frequent declarations, and proteſtations of his being far from all thoughts of deſigning an arbitrary government, and that the nation might be confident, he would rule by law.

Now if after all this, any officer of the king's ſhould pretend inſtructions from his maſter, to demand

ſo material an alteration of proceedings, in the higheſt caſes againſt law, as are above-mentioned, and the court (who are required to ſlight and reject the moſt ſolemn commands under the great ſeal, if contrary to law) ſhould upon a verbal intimation allow of ſuch a demand, and ſo break in upon this bulwark of our liberties, which the law has erected; might it not give too juſt an occaſion to ſuſpect, that all the legal ſecurities of our lives and properties, are unable to protect us? And may not ſuch fears rob the king of his greateſt treaſure, and ſtrength, the people's hearts, when they dare not rely upon him in his kingly office, and truſt, for ſafety and protection by the laws? Our Engliſh hiſtory affords many inſtances of thoſe that have pretended to ſerve our king in this manner, by undermining the people's right, and liberties, whoſe practices have ſometimes proved of fatal conſequence to the kings themſelves, but more frequently ended in their own deſtruction.

But, after all, imagining it could be made out, that this method of private examinations by a grand jury (which, from what has been ſaid before, hath appeared to be ſo extremely neceſſary for the publick good, and to every private man's ſecurity) were inconvenient, or miſchievous, and therefore fit to be changed; yet being ſo eſſential a part of the common law, it is no otherwiſe alterable, than by parliament. We find by preſidents, that the bare forms of indictments could not be reformed by the judges: The words *depopulatores agrorum, inſidiatores viarum, vi et armis, baculis, cultellis, arcubus & ſagittis*, could not be left out, but by advice of the kingdom in parliament. A writ iſſued in the time of king Ed. III. giving power to hear and determine offences, and all the juſtices reſolved *, "That they could

* Cok. 4. Inſt. p. 164.

not lawfully act, having their authority by writ, where they ought to have had it by commiſſion; Though it was in the form and words, that the legal commiſſion ought to be, John Knivett, chief juſtice, by advice of all the judges reſolved, that the ſaid writ was *contra legem*: and where divers indictments were before them found againſt T. S. the ſame, and all, that was done by colour of that writ, was damned."

If in ſuch ſeeming little things as theſe, and many others, that may be inſtanced, the wiſdom of the nation hath not thought fit to entruſt the judges, but reſerved the conſideration of them to the legiſlative power; it cannot be imagined, that they ſhould ſubject to the diſcretion, and pleaſure of the judges, thoſe important points, in the eſtabliſhed courſe of the adminiſtering juſtice, whereupon depends the ſafety of all the ſubjects lives and fortunes. If judges will take upon themſelves to alter the conſtant practice, they muſt either alter the oath of the grand jury, or continue it; if they ſhould alter it, ſo as to make it ſail with any ſuch new method, and thus in appearance charitably provide, that the grand jury ſhould not take a mock oath, or forſwear themſelves; they then make an incroachment upon the authority of parliaments, who only can make new, or change old legal oaths, and all the proceedings thereupon would be void.

If they ſhould continue conſtantly to impoſe the ſame oath, as well when they have notice from the king, that the jury ſhall not be bound to keep his ſecrets, and their own, as when they have none; they muſt aſſume to make the ſame form of law to be of force, and no force; and the ſame words to bind the conſcience, as they will have them; whereby they would profane the natural religion of an oath, and

bring a foul ſcandal upon chriſtianity, by trifling worſe than heathens in that ſacred matter; and whilſt the judges find themſelves under the neceſſity of adminiſtering the oath unto grand juries, and not ſuffer them to obſerve it according unto their conſciences, they would confeſs the illegality of their own proceedings, and can never be able to repair the breaches, by pretending a tacit implication, if the king will, but muſt unavoidably fall under that approved maxim of our law, *Maledicta eſt interpretatio quæ corrumpit textum*; It is a curſed interpretation that diſſolves the text.

There are two vulgar errors concerning the duty of grand juries, which, if not removed, will in time deſtroy all the benefit we can expect from that conſtitution, by turning them into a mere matter of form, which were deſigned for ſo great ends. Many have, of late, thought, and affirmed it for law, that the grand jury is neither to make ſo ſtrict enquiry into matters before them, nor to look for ſo clear evidence of the crime as the petit jury; but that of their preſentments, being to paſs a ſecond examination, they ought to indict upon a ſuperficial enquiry, and bare probabilities. Whereas, ſhould either of theſe opinions be admitted, the prejudice to the ſubject would be equal to the total laying aſide of grand juries; there being in truth no difference between arraigning without any preſentment from them at all, and their preſenting upon ſlight grounds.

For the firſt, that grand juries ought not to make ſo ſtrict enquiry, it were to be wiſhed, that we might know how it comes to paſs, that an oath ſhould be obligatory unto a petit jury, and not unto the grand? or in what points, they may lawfully, and with good conſcience, omit that exactneſs, whether in relation to

the witneſſes, and their credibility; or the fact and all its circumſtances; or the teſtimony and its weight? or, laſtly, in reference to the priſoner, and probability of his guilt? And withal, upon what grounds of law, or reaſon, their opinion is founded? On the contrary, he that will conſider either the oath they take, or the commiſſion where their duty is deſcribed, will find, in all points, that there lies an equal obligation upon them and the petit juries.

They ſwear "diligently to enquire, and true preſentment make, &c." and "to preſent the truth, the whole truth, and nothing but the truth, &c." And in the commiſſion of oyer and terminer, their duty, (with that of the commiſſioners) is thus deſcribed; *Ad inquirendum per ſacramentum proborum & legalium hominum, &c. per quos rei veritas melius ſciri poterit, de quibuſcunq; proditionibus, &c. confœderationibus, falſis allegantiis, nec non acceſſoriis eorundem, &c. per quoſcunq; & qualitercunq; habit fact. perpetrat, ſive commiſſ. Et per quos, et per quem, cui, vel quibus quando, qualiter, vel quomodo, & de aliis articulis & circumſtantiis præmiſ. & eorem aliquod, vel aliqua qualitercunq; concernem.* "To enquire by the oath of honeſt and lawful men, &c. by whom the truth of the matter may be beſt known, of all manner of treaſons, &c. confederacies, falſe teſtimonies, &c. As alſo the acceſſaries, &c. by whomſoever, or howſoever, done, perpetrated, or committed; by whom, or to whom, how, in what way, or in what manner. And of other articles and circumſtances premiſed, and of any other thing or things howſoever, concerning the ſame." Now, for any man, after this, to maintain, that grand juries are not to enquire, or not carefully, is as much, as in plain terms to ſay, they are bound to act contrary to the commiſſion, and their oath. And to affirm, that they can diſcharge their duty according to the obligations of law

and conſcience, which they lie under, without a ſtrict enquiry into particulars, is to affirm, that the end can be obtained without the means neceſſary unto it.

The truth is, that grand juries have both a larger field for their enquiry, and are, in many reſpects, better capacitated to make a ſtrict one, than the petit juries. Theſe laſt are confined as to the perſon and the crime, ſpecified in the indictment. But they are at large, obliged to ſearch into the whole matter, that any ways concerns every caſe before them, and all the offences contained in it, all the criminal circumſtances whatſoever, and into every thing, howſoever concerning the ſame. They are bound to enquire, whether their information of ſuſpected treaſons or felonies, brought by accuſers, be made by conſpiracy or ſubornation; who are the conſpirators, or falſe witneſſes; by whom abetted, or maintained; againſt whom, and how many, the conſpiracy is laid; when, and how, and in what courſe, it was to have been proſecuted.

But none of theſe moſt intricate matters (which need the moſt ſtrict and diligent enquiries) can come under the cognizance of the petit jury. The can only examine ſo much, as relates to the credit of thoſe witneſſes brought to prove the charge againſt the parties indicted; wherein, alſo, they have neither power, nor convenient time to ſend for perſons, or papers, if they think them needful, nor to reſolve any doubts of the lawfulneſs and credibility of the teſtimonies.

Yet further, if the crimes objected are manifeſt, it is then the grand jury's duty to enquire after all the perſons any ways concerned in them, and the ſeveral kinds of offences, whereof every one ought, jointly or ſeparately, to be indicted as they ſhall diſcover them to be

principles, or acceſſaries, parties, or privy thereunto, or to have comforted, or knowingly relieved, either the traitors or felons, or concealed the offences of others. But the inquiſition into all theſe matters, which require all poſſible ſtrictneſs in ſearching, as being of the higheſt importance unto the publick juſtice and ſafety, is wholly out of the power and truſt of the petit juries. The guilt, or innocence, of the parties put upon their trials, and the evidence thereof given, are the only objects of their enquiries. It is not their work, nor within their truſt, to ſearch into all the guilt or crimes of the parties whom they try. They are bound to move within the circle of the indictment made by the grand jury, who are to appoint and ſpecify the offences, for which the accuſed ſhall be tried by the petit jury.

When a proſecutor ſuggeſts that any man is criminal, and ought to be indicted, it belongs to the grand jury to hear all the proofs he can offer, and to uſe all other means they can, whereby they may come to underſtand the truth of the ſuggeſtion, and every thing, or circumſtance, that may concern it; then they are carefully to examine the nature of the facts, according unto the rules of the common law, or the expreſs words of the ſtatutes, whereby offences are diſtinguiſhed and puniſhments allotted unto each of them. 'Tis true, that upon hearing the party, or his witneſſes, the petit jury may acquit, or judge the facts in the indictment to be leſs heinous, or malicious, than they were preſented by the grand jury, but cannot aggravate them; which being conſidered, it will eaſily appear, by the intent and nature of the powers given unto grand juries, that they are by their oaths obliged, and their inſtitution ordained, to keep all injuſtice from entering the firſt gates of our courts of judicature, and to ſecure the innocent,

not only from punishment, but from all disgrace, vexation, expence, or danger.

To understand our law clearly herein, the jurors must first know the lawful grounds whereupon they may and ought to indict; and then, what truly and justly ought to be taken for the ground of an indictment. The principal, and most certain, is, the jurors personal knowledge, by their own eyes or ears, of the crimes whereof they indict; or so many pregnant concurring circumstances, as fully convince them of the guilt of the accused. When these are wanting, the depositions of witnesses, and their authority, are their best guides in finding indictments. When such testimonies make the charge manifest and clear to the jury, they are called evidence, because they make the guilt of the criminal evident, and are like the light, that discovers what was not seen before. All witnesses, for that reason, are usually called the evidence, taking their name from what they ought to be. Yet witnesses may swear directly and positively to an accusation, and be no evidence of its truth to the jury; sometimes such remarks may be made upon the witnesses, as well in relation to their reputation and lives, as to the matter, manner, and circumstance, of their depositions, that from thence the falshood may appear, or be strongly suspected. It is therefore necessary, to know what they mean by a probable cause or evidence, who say that our law requires no more for an indictment.

Probable, is a logical term, relating to such propositions, as have an appearance, but no certainty of truth; shewing rather what is not, than what is the matter of syllogisms. These may be allowed in rhetorick, which worketh upon passions, and makes use of such colours as are fit to move them, whether true or false; but not

in logick, whoſe object is truth; as it principally intends to obviate the errors that may ariſe from the credit given unto appearances, by diſtinguiſhing the uncertain from the certain, *veriſimile a vero*, it cannot admit of ſuch propoſitions, as may be falſe as well as true, it being as impoſſible to draw a certain concluſion from uncertain premiſes, as to raiſe a ſolid building upon a tottering or ſinking foundation. This ought principally to be conſidered in courts of juſtice, which are not erected to bring men into condemnation, but to find who deſerves to be condemned, and thoſe rules are to be followed by them, which are leaſt liable to deception. For this reaſon, the council of the Areopagites, and ſome others of the beſt judicatures that have been in the world, utterly rejected the uſe of rhetorick, looking upon the art of perſuading by uncertain probabilities, as little differing from that of deceiving, and directly contrary to their ends, who, by the knowledge of truth, deſired to be led into the doing of juſtice. But if the art, that made uſe of their probabilities, was baniſhed from uncorrupted tribunals, as a hindrance unto the diſcovery of truth, they that would ground verdicts totally upon them, declare an open neglect of it; and as it is ſaid, that *uno abſurdo dato mille ſequntur*, if juries were to be guided by probabilities, the next queſtion would be, concerning the more or leſs probable, or what degree of probability is required to perſuade them to find a bill. This being impoſſible to fix, the whole proceedings would be brought to depend upon the fancies of men, and as nothing is ſo ſlight but it may move them, there is no ſecurity that innocent perſons may not be brought every day into danger and trouble. By theſe means certain miſchiefs will be done, whilſt it is, by their own confeſſion, uncertain, whether they are any ways deſerved by ſuch as ſuffer them, to the utter overthrow of all juſtice.

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If the word probable, be taken in a common, rather than in a nice logical ſenſe, it ſignifies no more than likely, or rather likely than unlikely. When a matter is found to be ſo, the wager is not even, there is odds upon one ſide, and this may be a very good ground for betting in a tennis court, or at a horſe-race; but he that would make the adminiſtration of juſtice to depend upon ſuch points, ſeems to put a very ſmall value upon the fortunes, liberties, and reputation of men, and to forget, that thoſe who ſit in courts of juſtice, have no other buſineſs there than to preſerve them.

This continues in force, though in a Dialogue between a Barriſter and a Grand Jury-man, publiſhed under the title of the Grand Jury-man's Oath and Office, it be ſaid, page 8. and 9. "That their work is no more than to preſent offences fit for a trial, and for that reaſon, give in only a veriſimilar or probable charge; and others have affirmed, that a far leſs evidence will warrant a grand jury's indictment, than a petit jury's verdict." For nothing can be more oppoſite to the juſtice of our laws, than ſuch opinions. All laws, in doubtful caſes, direct a ſuſpenſion of judgment, or a ſentence in favour of the accuſed perſon. But if this were hearkened unto, grand juries ſhould, upon their oaths, affirm, they judge him criminal, when the evidence is upon ſuch uncertain grounds, that they cannot but doubt whether he is ſo or not.

It cannot be hereupon ſaid, that no evidence is ſo clear and full, but it may be falſe, and give the jury occaſion of doubts, ſo as all criminals muſt eſcape, if no indictment ought to be found unleſs the proofs are abſolutely certain; for it is confeſſed, that ſuch caſes are not capable of an infallible, mathematical demonſtra-

tion; but a jury, that examines all the witneſſes, that are likely to give any light concerning the buſineſs in queſtion, and all circumſtances relating to the fact before them, with the lives and credit of thoſe that teſtify it, and of the perſon accuſed, may, and do often, find that, which in their conſciences, doth fully perſuade them that the accuſed perſon is guilty. This is as much as the law, or their oath, doth require, and ſuch as find bills, after having made ſuch a ſcrutiny, are blameleſs before God and man, if, through the fragility inſeparable from human nature, they ſhould be led into error. For they do not ſwear that the bill is true, but that they, in their conſciences, believe that it is ſo. And if they write *ignoramus* upon the bill, it is not thereby declared to be falſe, nor the perſon accuſed acquitted, but the matter is ſuſpended, until it can be more clearly proved, as, in doubtful caſes, it always ought to be.

Our anceſtors took great care, that ſuſpicious and probable cauſes ſhould not bring any man's life and eſtate into danger. For that reaſon, it was ordained, by the Statute, 37 Ed. III. cap. 18. "That ſuch as made ſuggeſtions to the king, ſhould find ſurety to purſue and incur the ſame pain, that the other ſhould have had if he were attainted, in caſe their ſuggeſtion be found evil, and that then proceſs of the law ſhould be made againſt the accuſed.

This manner of proceeding hath its root on eternal and univerſal reaſon. The law, given by God unto his people, Deut. xix. allotted the ſame puniſhment unto a falſe witneſs, as a perſon convicted. The beſt diſciplined nations of the world learnt this from the Hebrews, and made it their rule, in the adminiſtration of juſtice. The Grecians generally obſerved it, and the

Romans, according to their *lex talionis*, did not only puniſh death with death, but the intention of committing murder by falſe accuſations, with the ſame ſeverity as if it had been effected by any other means. This law was inviolably obſerved as long as any thing of regularity or equity remained amongſt them; and when through the wickedneſs of ſome of the emperors, or their favourites, it came to be overthrown, all juſtice periſhed with it. A crew of falſe informers brake out, to the deſtruction of the beſt men, and never ceaſed, until they had ruined all the moſt eminent and ancient families; circumvented the perſons, that by their reputation, wealth, birth, or virtue, deſerved to be diſtinguiſhed from the common ſort of people, and brought deſolation upon that victorious city, Tacitus * complains of this, as the cauſe of all the miſchiefs ſuffered in his time and country.

By their means, the moſt ſavage cruelties were committed, under the name of law, which thereby became a greater plague, than formerly crimes had been. No remedy could be found, when thoſe *delatores*, whom he calls † *genus hominum publico exitio repertum, & pœnis quidem nunquam ſatis coercitum*, were invited by impunity or reward, and the miſerable people groaned under this calamity, until thoſe inſtruments of iniquity, were by better princes, put to the moſt cruel, though well deſerved deaths.

The like hath been ſeen in many places, and the domeſtic quiet, which is now enjoyed in the principal

* Tac. Ann. 3.

† Tac. Ann. 4.

parts of Europe, proceeds chiefly from this, that every man knows, the ſame puniſhment is appointed for a falſe accuſation and a proved crime.

It is hardly ſeven years ſince Monſieur Courboyer, a man of quality in Brittany, ſuborned two of the king of France's guards, to ſwear treaſonable deſigns againſt La Motte, a Norman gentleman. The matter being brought to Monſieur Colebert, he cauſed the accuſed perſon and the witneſſes to be ſecured, until the fraud was diſcovered by one of them, whereupon he was pardoned; La Motte releaſed; Courboyer beheaded; and the other falſe witneſs hanged, by the ſentence of the parliament of Paris. Though this law ſeems to be grounded upon ſuch foundation, as forbids us to queſtion the equity of it, our anceſtors, for reaſons beſt known unto themſelves, thought fit to moderate its ſeverity, by the Statute of 38 Ed. III. cap. 9. yet then it was enacted, and the law continues in force unto this day, "That whoſoever made complaints to the king, and could not prove them againſt the defendant," by the proceſs of law limited in former ſtatutes, which is firſt by a grand jury, he "ſhould be impriſoned until he had made gree to the party of his damages, and of the ſlander he ſuffered by ſuch occaſion, and after ſhall make fine and ranſom to the king," which is for the common damage, that the king and his people ſuffer by ſuch a falſe accuſation and defamation of any ſubject. And in the 42 Ed. III. cap. 3. "To eſchew the miſchiefs and damages done by falſe accuſers, it is enacted, that no man be put to anſwer ſuch ſuggeſtions without preſentment before the juſtices," that is, by the grand jury. It cannot ſurely be imagined, that the ſuggeſtions, made to the king and his council, had no probability in them, or that there was no colour, cauſe, or reaſon, for the king to put the party to anſwer the

accuſation, but the grievance and complaint was, that the people ſuffered certain damage and vexation, upon untrue, and, at beſt, uncertain accuſations, and that therein the law was perverted, by the king and his councils taking upon them to judge of the certainty or truth of them, which of right belonged to the grand jury only, upon whoſe judgment and integrity our law doth wholly rely, for the indemnity of the innocent, and the puniſhment of all ſuch as do unjuſtly moleſt them.

Our laws have not thought fit ſo abſolutely to depend upon the oaths of witneſſes, as to allow, that upon two, or ten men's ſwearing poſitively treaſon or felony againſt any man, before the juſtices of peace, or all the judges, or before the king and his council, that the party accuſed, be he either peer of the realm, or commoner, ſhould, without further enquiry, be thereupon arraigned, and put upon his trial for his life. Yet none can doubt, but there is ſomething of probability in ſuch depoſitions, nevertheleſs the law refers thoſe matters unto grand juries, and no man can be brought to trial, until, upon ſuch ſtrict enquiries, (as is before ſaid) the indictment be found. The law is ſo ſtrict, in theſe enquiries, that though the crime be never ſo notorious, nay, if treaſon ſhould be confeſſed in writing under hand and ſeal, before juſtices of peace, ſecretaries of ſtate, or the king and council, yet before the party can be arraigned for it, the grand jury muſt enquire, and be ſatisfied, whether ſuch a confeſſion be clear and certain; whether there was no colluſion therein; or the party induced to ſuch confeſſion by promiſe of pardon; or that ſome pretended partakers in the crime may be defamed, or deſtroyed thereby. They muſt enquire, whether the confeſſion was not extorted by fear, threatenings, or force; and whether

the party was truly *compos mentis*, of ſound mind and reaſon at that time.

The Statute 5 Eliz. cap. 1. declares, the ancient common law concerning the truſt and duty of juries, and enacts, that none ſhould "be indicted for aſſiſting, aiding, comforting, or abetting," criminals, in the treaſons therein made and declared, "unleſs he, or they, be thereof lawfully accuſed, by ſuch good and ſufficient teſtimony or proof, as by the jury, by whom he ſhall be indicted, ſhall be thought good, lawful, and ſufficient to prove him, or them, guilty of the ſaid offences." Herein is declared the only true reaſon of indictments, i. e. the grand jury's judgment that they have ſuch teſtimonies, as they eſteem ſufficient to prove the party indicted guilty of the crimes whereof he is accuſed, and whatſoever the indictment doth contain, they are to preſent no more, or other crimes, than are proved to their ſatisfaction, as upon oath they declare it is, when they preſent it. This exactneſs is not only required in the ſubſtance of crimes, but in the circumſtances; and any doubtfulneſs, or uncertainty, in them, makes the indictment, and all proceedings upon it, by the petit jury, to be inſufficient, and void, and holden for none, as appears by the following caſes.

In Young's caſe, in the *Lord Cook's Reports*, lib. 4. fol. 40. an indictment for murder was declared void for its uncertainty, becauſe the jury had not laid certainty in what part of the body the mortal wound was given, ſaying only, that it was about his breaſt, the words were, *unam plagam mortalem circiter pectus*. In like manner, in Vaux's caſe, *Cook's Reports*, lib. 4. fol. 44. he being indicted for poiſoning Ridley, the jury had not plainly and expreſsly averred that Ridley drank the poiſon, though other words implied it, and thereupon

the indictment was judged insufficient; "for, (saith the book) the matter of an indictment ought to be full, express, and certain, and shall not be maintained by argument or implication, for that the indictment is found by the oath of the neighbourhood." In the 2d. part of *Roll's Reports*, page 263. Smith and Mall's case, the indictment was quashed for uncertainty; because the jury had averred, that Smith was either a servant or deputy, *Smith existens servus sive deputatus*, are the words. It was doubtless, probably enough proved to the jury, that he was either a deputy or servant, but because the indictment did not absolutely and certainly aver his condition, either of servant or deputy, it was declared void. If there be any defect of certainty in the grand juries verdict, no proof, or evidence to the petit jury, can supply it; so it was judged in Wrote and Wig's case, *Coke 4 Rep.* fol. 45, 46, 47. It was laid, that Wrote was killed at Shipperton, but did not aver that Shipperton was within the verge, though in truth it was; and no averment or oath, to the petit jury, could supply that small failure of certainty to support the indictment. And the reason is rendered in these words, viz. "The indictment being *veredictum id est dictum veritatis a verdict*, that is, a saying of truth and matter of record, ought to contain the whole truth, which is requisite by the law, for when it doth not appear, it is the same as if it were not, and every material part of the indictment ought to be found upon the oath of the indicters, and cannot be supplied by the averment of the party." The grand jury's verdict is the foundation of all judicial proceeding against capital offenders, (at the king's suit) if that fail in any point of certainty, both convictions and acquittals thereupon, are utterly void, and the proceedings against both may begin again, as they if they had never been tried, as it appears in the case last cited, *fol.* 47.

Now as the law requires from the grand jury particular, certain, and preciſe, affirmations of truth, ſo it expects that they ſhould look for the like, and accept of no other, from ſuch as bring accuſations to them. For no man can certainly affirm that which is uncertainly delivered unto him, or which he doth not firmly believe. The witneſſes, that they receive for good, are to depoſe only abſolute certainties about the facts committed; that is, what they have ſeen or heard from the accuſed parties themſelves, not what others have told them. They are not to be ſuffered to make probable arguments, and infer from thence the guilt of the accuſed; their depoſitions ought to be poſitive, plain, direct, and full. The crime is to be ſworn without any doubtfulneſs or obſcurity; not in words qualified, or limited to belief, conceptions, or apprehenſions. This abſolute certainty, required in the depoſition of the witneſſes, is one principal ground of the jury's moſt rational aſſurance of the truth of their verdict. The credit alſo of the witneſſes ought to be free from all blemiſh, that good and conſcientious men may rationally rely upon them, in matters of ſo great moment as the blood of a man. It muſt alſo be certainly evident, that all the matters which they depoſe, are conſiſtent with each other, and accompanied with ſuch circumſtances, as, in their judgment, render it credible. All juſt indictments muſt be built upon theſe moral aſſurances, which the wiſdom of all nations hath deviſed, as the beſt and only way of deciding controverſies. Neither can a grand jury-man, who ſwears to preſent nothing but the truth, be ſatisfied with leſs.

'Tis ſcarcely credible, that any, learned in our laws, ſhould tell a grand jury, that a far leſs evidence will warrant their indictment, being but an accuſation, than the petit jury ought to have for their verdict. Both of

them do, in like manner, plainly and positively affirm, upon their oaths, the truth of the accusation. Their verdicts are indeed one, and the same in substance and sense, though not in words. There is no real difference, between affirming in writing, that an indictment of treason is true, as is the practice of grand juries, and saying, that the party, tried thereupon, is guilty of the treason whereof he is indicted, as is the course of petit juries. They are both upon their oaths; they are equally obligatory unto both; the one, therefore, must expect the same proof for their satisfaction as the other, and as clear evidence must be required for an indictment, as for a verdict. It is unreasonable to think, that a slighter proof should satisfy the consciences of the greater jury, than is requisite to convince the less. and, uncharitable to imagine, that those should not be as sensible as the others of the sacred security they have given by oath, to do nothing in their offices but according to truth.

If there ought to be any difference in the proceedings of the grand and petit juries, the greater exactness and diligence seems to be required in the grand. For as the same work of finding out the truth, in order to the doing of justice, is allotted unto both, the greatest part of the burden ought to lie upon them that have the best opportunities of performing it. The invalidity, weakness, or defects of the proofs, may be equally evident to either of them. But if there be deceit in stifling true testimonies, or malice in suborning wicked persons, to bring in such as are false, the grand jury may most easily, nay probably, can only discover it. They are not straitened in time; they may freely examine in private, without interruption from the council or court, such witnesses as are presented unto them, or they shall think fit to call; they may jointly, or se-

verally, enquire of their friends or acquaintance, after the lives and reputations of the witneſſes, or the accuſed perſons, and all circumſtances relating to the matter in queſtion, and conſult together under the ſeal of ſecrecy. On the other ſide, the petit jury, being charged with the priſoner, acts in open court, under awe of the judges, is ſubject to be diſturbed, or interrupted by council: Deprived of all opportunity of conſulting one another, until the evidence be ſummed up, and not ſuffered to eat or drink, until they bring in a verdict; ſo is it almoſt impoſſible for them, thus limited, to diſcover ſuch evil practices, as may be uſed for or againſt the priſoner, by ſubornation or perjury to pervert juſtice. If, therefore, the grand jury be not permitted to perform this part of their duty, it is hard to imagine how it ſhould be done at all. And it is much more inconceivable, how they can ſatisfy tneir conſciences, if they ſo neglect, as to find a bill upon an imperfect evidence, in the abſence of the priſoner, in expectation that it will be ſupplied at the bar. It concerns them therefore to remember, that if they proceed upon ſuch uncertainties, they will certainly give incurable wounds into their neighbours reputations, in order unto the deſtruction of their perſons.

Whatever ground this doctrine of indicting upon ſlight proofs may have got in our days, it is, as we have ſeen, both againſt law and reaſon, and contrary to the practice of former times. My lord Coke, in his *Comment on Weſtm. 2d.* chap. 12. tells us, "That in thoſe days, (and as yet it ought to be) indictments, taken in the abſence of the party, were formed upon plain and direct proofs, and not upon probabilities and inferences." Herein we ſee, that the practice of our forefathers, and the opinion of this great and judicious lawyer, were directly againſt this new doctrine, and ſome that have

carefully looked backward, obſerved, that there are very few examples of men acquitted by petit juries, becauſe grand juries of old were ſo wary in canvaſſing every thing narrowly, and ſo ſenſible of their duty, in proceeding according unto truth, upon ſatisfactory evidence, that few, or none, were brought unto trial till their guilt ſeemed evident.

It is, therefore, a great miſtake, to think that the ſecond juries were inſtituted for the hearing of fuller proofs; that was not their work, but to give an opportunity to the accuſed perſons to anſwer for themſelves, and make their defence, which cannot be thought to ſtrengthen the evidence, unleſs they be ſuppoſed to play booty againſt their own lives. By way of anſwer, the priſoner may avoid the charge; he is permitted to take exceptions; he may demur, or plead to the indictments, in points of law. Herein the judges ought to aſſiſt him, and appoint counſel if he deſire it. He may ſhew that the indicters, i. e. the grand jury, or ſome of them, are not lawful men, or not lawfully returned by the ſheriffs. Embracery or practice may be proved, in the packing of the jury; a conſpiracy, or ſubornation, may be diſcovered; falſhood may be found out in the witneſſes, by queſtions about ſome circumſtances that none could have aſked, or imagined, except the party accuſed. And beſides doing right to the indicted, in theſe and many other things, it is the people's due to have all the evidence firſt taken in private, to be afterwards made publick at the trial, that the kingdom may be ſatisfied in the equal adminiſtration of juſtice, and that the judgments againſt criminals may be of greater terror, and more uſeful to preſerve the common peace.

If any object, that this doctrine would introduce double trials for every offence, and all the delays that accompany them, it may be answered, That *nulla unquam de morte hominis cunctatio longa est.* Ju. Sat. No delay is to be esteemed long, when the life of a man is in question. The punishment of an offender, that is a little deferred, may be compensated by its severity, but blood, rashly spilt, cannot be gathered up, and a land polluted by it, is hardly cleansed. Wise and good men, in matters of this nature, have ever proceeded with extreme caution; whilst the swift of foot are, in the scripture, represented under an ill character, and have been often found, in their haste, to draw more guilt upon themselves, than what they pretended to chastise in others. To avoid this mischief, in many well polished kingdoms, several courts of justice are instituted, who take cognizance of the same facts, but so subordinate unto one another, that in matters of life, limb, liberty, or other important cases, there is a right of appeal from the inferior, before which it is first brought, to the superior where this is wanting, means have been found to give opportunity unto the judges to reflect upon their own sentences, that if any thing had been done rashly, or through mistake, it might be corrected; man, even in his best estate, seeming to have need of some such help. Tiberius Cæsar was never accused of too much lenity; but when he heard that Lutorius Priscus had been accused of treason before the senate, condemned, and immediately put to death, *tam præcipites deprecatus est pœnas*, he desired, that such sudden punishments might for the future be forborn, and a law was thereupon made, "That no decree of the senate should in less than ten days be transmitted to the treasury," before which time it could not be executed *.

* Tac. Ann. 3.

Matters of this nature concerning every man in England, it is not to be doubted but our anceſtors conſidered them, and our conſtitutions, neither admitting of ſubordinate judicatures, from whence appeals may be made, nor giving opportunities unto juries to re-examine their verdicts after they were given, they could not find a way more ſuitable unto the rules of wiſdom, juſtice, and mercy, than to appoint two juries, with equal care, according unto different methods, the one in private, and at leiſure, the other publickly, in the preſence of the party, and more ſpeedy to paſs upon every man, ſo as none can be condemned, unleſs he be thought guilty by them both; and it cannot be imagined, that ſo little time, as is uſually ſpent in trials at the bar, before a petit jury, ſhould be allowed unto one that pleads for his life, or unto them, who are to be ſatisfied in their conſciences, unleſs it were preſumed, that the grand jury had ſo well examined, prepared, and digeſted the matter, that the other may proceed more ſuccinctly without danger of error.

Therefore let the grand juries faithfully perform their high truſt, and neither be cheated nor frighted from their duty. Let them purſue the good old way, ſince no innovation can be brought in, that will not turn to the prejudice of the accuſed perſons, and themſelves. Let them not be deluded with frivolous arguments, ſo as to invalidate a conſiderable part of our law, and render themſelves inſignificant cyphers, in expectation that petit juries will repair the faults they commit, ſince that would be no leſs than to ſlight one of the beſt fences that the law provides for our lives and liberties, and very much to weaken the other.

When a grand jury finds a bill againſt any perſon, they do all that in them lies to take away his life, if the crime be capital, and it is ridiculous for them to pretend they rely upon the virtue of the petit jury, if they ſhew none in themſelves. They cannot reaſonably hope, the other ſhould be more tender of the priſoner's concernments, more exact in doing juſtice, or more careful in examining the credit of the witneſſes, when they have not only neglected their duty of ſearching into it, but added ſtrength unto their teſtimony, by finding a bill upon it.

They cannot poſſibly be exempted from the blame of conſenting (at the leaſt) unto the miſchiefs that may enſue, unleſs they uſe all the honeſt care that the law allows to prevent them; nor conſequently avoid the ſtain of the blood that may be ſhed by their omiſſion, ſince it could not have been, if they had well performed their part before they found the indictment, whereby the party is expoſed to ſo many diſadvantages, that it is hard for the cleareſt innocence to defend itſelf againſt them.

But when the one and the other jury act as they ought, with courage, diligence, and indifference, we ſhall have juſt reaſon, with the wiſe lord chancellor Forteſcue, to celebrate that law that inſtituted them. To congratulate with our countrymen the happineſs we enjoy, whilſt our lives lie not* "at the mercy of unknown witneſſes, hired, poor, uncertain, whoſe converſation, or malice we are ſtrangers to, but neighbours of ſubſtance, of honeſt report, brought into court by

* Fort. de laud. Leg. Ang. cap. 26.

an honourable ſworn officer; men who know the witneſſes, and their credit, and are to hear them, and judge of them; that want no means for diſcloſing of truth, and from whom nothing can be hid, which can fall within the compaſs of human knowledge.

POSTQUAM rex * per ſpatium trium annorum & amplius in partibus tranſmarinis remanſiſſet, & de partibus Vaſconiæ & Franciæ in Angliam rediiſſet, valde anxiatus & conturbatus fuit per quotidianum clamorem tam clericorum quam laicorum petentium ab eo congruum remedium apponi verſus juſticiarios, & alios miniſtros ſuos, de multimodis oppreſſionibus & gravaminibus contra bonas leges & conſuetudines regni illis factis †; ſuper quo dominus Edvardus Rex, per regale ſcriptum Vicecomitibus Angliæ præcipit quod in omnibus comitatibus, civitatibus, & villis mercatoriis, publice proclamari facerent quod omnes qui ſeſe ſentient gravari venirent apud Weſtm. ad proximum parliamentum, & ibi querimonias ſuas monſtrarent, ubi tam majores quam minores opportunum remedium & celerem juſtitiam recuperent, ſicut rex vinculo juramenti die coronationis ſuæ aſtrictus fuit ‡: ac jam adeſt magnus dies & judiciarius juſticiorum & aliorum miniſtrorum concilii regis, quem nulla tergiverſatione, nullo munere, nulla arte vel ingenio placitandi valent eludi. Coadunatis itaque clero & populo & in magno palatio Weſtmonaſterii conſeſſis, archiepiſcopus Cantuarienſis (vir magnæ pietatis & columna quaſi ſanctæ eccleſiæ & regni) ſurrexit in medio, & ab alto

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* Ex Chronico ab Anno 1272, 1 Ed. I. ad Anno 1317, 10 Ed. II. Mſſ.

† An. Dom. 1289. Annoq; Regni Regis. Ed. I. 18.

‡ Certe ſcimus quam plurimos eorum qui judiciis ſub Ed. I. præfuere viros quidem maximos & ævo in illo Juriſconſultos celeberrimos repetundarum & quod lites ſuas fecerant alioſq; præter Miniſtros, forenſes aliquot merito damnatos multos exilio, & carcere punitos. Ex Seldein ad Fletam diſſertatio. p. 548.

AFTER that the king for the ſpace of three years and more, had remained beyond ſea, and returned out of Gaſcoign and France into England, he was much vexed and diſturbed by the continual clamour both of the clergy and laity, deſiring to be relieved againſt the juſtices, and other his majeſties miniſters, of ſeveral oppreſſions and injuries done unto them, contrary to the good laws and cuſtoms of the realm; whereupon king Edward, by his royal letters to the ſeveral ſheriffs of England, commanded that in all counties, cities, and market towns, a proclamation ſhould be made, that all who found themſelves aggrieved ſhould repair to Weſtminſter at the next parliament, and there ſhew their grievances, where as well the great as the leſs ſhould receive fit remedies and ſpeedy juſtice, according as the king was obliged by the bond of his coronation oath: and now that great day was come, that day of judging even the juſtices and the other miniſters of the king's council, which by no colluſion or reward, no argument or art of pleading they could elude or avoid. The clergy therefore and the people being gathered together and ſeated in the great palace of Weſtminſter, the archbiſhop of Canterbury (a man of eminent piety, and as it were a pillar of the holy church and the kingdom) riſing from his ſeat, and fetching a profound ſigh, ſpoke in this manner: "Let this aſſembly know that we are called together concerning the great and weighty affairs of the kingdom (too much, alas! of late diſturbed, and ſtill out of order) unanimouſly, faithfully and effectually with our lord the king to treat and ordain: Ye have all heard the grievous complaints of the moſt intolerable injuries and oppreſſions of the daily deſolations committed both on church and ſtate, by this corrupt council of our lord the king, contrary to our great

ducens ſuſpiria, noverit univerſitas veſtra (ait) quod convocati ſumus de magnis & arduis negotiis regni (heu nimis perturbati & his diebus enormiter mutilati) unanimimiter, fideliter, & efficaciter ſimul cum domino rege ad tractandum & ordinandum *, audiviſtis etiam univerſi querimonias graviſſimas ſuper intolerabilibus injuriis&oppreſſionibus & quotidianis deſolationibus, tam ſanctæ eccleſ. quam reg. factis per hoc iniquum concilium domini regis contra magnas chartas tot, toties & multoties emptas & redemptas, conceſſas & confirmatas per tot & talia juramenta domini regis nunc, & dominorum Henrici & Johannis, ac per terribiles fulminationes excommunicationis ſententiæ in tranſgreſſores communium libertatum Angliæ, quæ in chartis prædictis continentur corroboratas, & cum ſpes præconcepta de libertatibus illis obſervandis fideliter ab omnibus putaretur ſtabilis & indubitata, rex conciliis malorum, miniſtrorum præventus & ſeductus eaſdem infringendo contravenire non formidavit, credens deceptive pro munere abſolvi a tranſgreſſione quod eſſet manifeſtum regni exterminium.

Aliud etiam nos omnes angit intrinſecus quod juſticiarii ſubtiliter ex malitia ſua ac per diverſa argumenta avaritiæ, & intolerabilis ſuperbiæ regem contra fideles ſuos multipliciter provocaverunt & incitaverunt, ſanoque & ſalubri conſilio ligeorum Angliæ contrarium reddiderunt, conſilia ſua vana impudenter præponere & affirmare non erubuerunt ſeu formidaverunt, ac ſi plus habiles eſſent ad conſulendam & conſervandam rempublicam quam tota univerſitas regni in unum collecta. Ita de illis poſſit vere dici, viri qui turbaverunt terram

* Vide Fleta cap. 17. p. 18, 19. Authoritas & officium ordinarii concilii regis.

charters, ſo many and ſo often, purchaſed and redeemed, granted and confirmed to us by the ſeveral oaths of our lord the king that now is, and of our lords king Henry and John, and corroborated by the dreadful thunderings of the ſentence of excommunication againſt the invaders of our common liberties of England in our ſaid charters contained; and when we had conceived firm and undoubted hopes, that theſe our liberties would have been faithfully preſerved by all men, the king circumvented and ſeduced by the councils of evil miniſters, hath not been afraid to violate it by infringing them; falſly believing, that he could, for rewards, be abſolved from that offence, which would be the manifeſt deſtruction of the kingdom.

"There is another thing alſo that grieves our ſpirits, that the juſtices, ſubtilly and maliciouſly, by divers arguments of covetouſneſs and intolerable pride, have the king, againſt his faithful ſubjects, ſundry ways incited and provoked, counſelling him contrary to the good and wholeſome advice of all the liege men of England, and have not bluſhed, nor been afraid, impudently to aſſert, and prefer their own fooliſh councils, as if they were more fit to conſult and preſerve the commonweal, than all the eſtates of the kingdom together aſſembled; ſo that it may be truly ſaid of them, they are the men that troubled the land, and diſturbed the nation under a falſe colour of gravity, have the whole people grievouſly oppreſſed, and, under pretence of expounding the antient laws, have introduced new (I will not ſay laws, but) evil cuſtoms, ſo that through the ignorance of ſome, and partiality of others, who for reward, or fear of great men, have been engaged, there was no certainty of law, and they ſcorned to adminiſter juſtice to the people, their deeds are deeds of

& concuſſerunt regnum ſub fuco gravitatis totum populum graviter oppreſſerunt, prætextuq; ſolummodo exponendi veteres leges, novas (non dicam leges) ſed malas conſuetudines introduxerunt & vomuerunt, ita quod per ignorantiam nonnullorum ac per partialitatem aliorum qui vel per munera vel timorem aliquorum potentum innodati fuerunt, nulla fuit ſtabilitas legum nec alicui de populo juſtitiam dignabantur exhibere, opera eorum ſunt opera nequitiæ, & opus iniquitatis in manibus, pedes eorum ad malum currunt & feſtinant, ac viam recti neſcierunt. Quid dicam ? non eſt judicium in greſſibus ſuis.

Quam plurimi liberi hominis terræ noſtræ fideles domini regis quaſi viles ultimæ ſervi conditionis diverſis carceribus ſine culpa commiſſerunt, ibidem carcerandi quorum non nulli in carcere fame, mœrore & vinculorum pondere defecerunt, extorquerunt pro arbitrio inſuper infinitam pecuniam ab eiſdem pro redemptione ſua, crumenas aliorum ut ſuas impregnarent tam a divitibus quam pauperibus exhauſerunt, ratione quorum incurriverunt odium inexorabile & formidabiles imprecationes omnium quaſi tale incommunicabile privilegium per chartam deteſtabilem de non obſtante obtinuerunt et perquiſiverunt ut a lege divina humanaque quaſi ad libitum immunes eſſent.

Gravamen inſuper ſolitum adhuc ſive aliquo modo ſævit, omnia ſunt venalia ſi non quaſi furtiva, proh dolor.

——————Quid non mortalia pectora cogit
Auri ſacra fames? ——————————————

Ex ore meo contra vos O impii tremebunda cœli decreta jam auditis. Agnitio vultuum veſtrorum ac-

wickedneſs, and the work of iniquity is in their hand; their feet make haſte to evil, and the way of truth have they not known. What ſhall I ſay? there is no judgment in their paths.

How many freemen of this land, faithful ſubjects of our lord the king, have, like the meaneſt ſlaves of loweſt condition, without any fault, been caſt into priſon, where ſome of them by hunger, grief, or the burden of their chains, have expired; they have alſo extorted at their pleaſure, infinite ſums of money for their ranſoms; the coffers of ſome, that they might fill their own, as well from the rich as the poor, they have exhauſted, by reaſon whereof they have contracted the irreconcileable hatred and dreadful imprecations of all men, as if they had purchaſed and obtained ſuch an incommunicable privilege, by the deteſtable charter of *non obſtante*, that they might, at their own luſt, be free from all laws, both human and divine.

" Moreover, there is another, more the ordinary grievance, which hitherto hath, and in ſome meaſure, doth ſtill rage amongſt us. All things are expoſed to ſale, if not as it were to plunder and theft. Alas! how great power hath the love of money in the breaſts of men! Hear, therefore, O ye wicked, from my mouth, the dreadful decree of heaven; the dejection of your countenances accuſeth you, and, like the men of Sodom, ye have not hidden, but proclaimed the ſin. Woe be to your ſouls, woe be to them that make laws, and writing, write injuſtice, that they may oppreſs the poor in judgment, and injure the cauſe of the humble; that widows may become their prey, and that they might deſtroy the orphan. Woe be to thoſe that build their houſes in injuſtice, and their tabernacles in unrighteouſneſs. Woe be to them that covet large poſ-

cuſat vos, & peccatum veſtrum quaſi Sodoma prædicaviſtis nec abſcondiſtis, væ animæ veſtræ, væ qui condunt leges & ſcribentes injuſtitiam ſcripſerunt, ut opprimerent in judicio pauperes, & vim facerent cauſæ humilium populi, ut eſſent viduæ præda eorum, & pupillos diriperent, væ qui ædificant domum ſuam injuſtitia & cœnacula ſua non in judicio, væ qui concupiverunt agros & violenter tulerunt & rapuerunt domos & oppreſſerunt virum & domum ejus imo virum & hæreditatem ſuam, væ judices qui ſicut lupi veſpere non relinquebant oſſa in mane; juſtus judex adducit conſiliarios in ſtultum finem & judices in ſtuporem, mox alta voce juſtum judicium terræ recipietis.

His auditis omnium aures tinniebant totaque communitas ingemuerunt, dicentes, heu nobis, heu, ubi eſt Angliæ toties empta, toties conceſſa, toties ſcripta, toties jurata libertas?*

Alii de criminalibus ſeſe a viſibus populi ſubtrahentes in locis ſecretis cum amicis tacite latitaverunt alios protulerunt in medium unde merito fere omnes ab officiis depoſiti & amoti, unus a terra exulatus alii perpetuis priſonis incarcerati, alii que gravibus pecuniarum ſolutionibus juſte adjudicati fuerunt†.

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* Vide Matt. Weſt. Anno 1289, p. 376. li. 13.

† Anno vero 1290. (18 Ed. I.) deprehenſis omnibus Angliæ juſticiariis de repetundis (præter Jo. Metingham, & Eliam de Bleckingham, quos honoris ergo nominatos volui) judicio parliamenti vindicatum eſt in alios, atque alios carcere, exilio, fortunarumque omnium diſpendio, in ſingulos mulcta graviſſima & amiſſione officii. Spelman's Gloſſary, p. 1. co. 1. 416.

ſeſſions, that break open houſes, and deſtroy the man and his inheritance. Woe be to ſuch judges, who are like wolves in the evening, and leave not a bone till the morning. The righteous Judge will bring ſuch counſellors to a fooliſh end, and ſuch judges to confuſion; ye ſhall all preſently, with a loud cry, receive the juſt ſentence of the land."

At the hearing of theſe things all ears tingled, and the whole community lifted up their voice, and mourned, ſaying, Alas, alas for us! what is become of that Engliſh liberty which we have ſo often purchaſed, which by ſo many conceſſions, ſo many ſtatutes, ſo many oaths, hath been confirmed to us?

Hereupon ſeveral of the criminals withdrew into ſecret places, being concealed by their friends; ſome of them were brought forth into the midſt of the people, and deſervedly turned out of their offices; one was baniſhed the land, and others were grievouſly fined, or condemned to perpetual impriſonment.

This is confirmed by Spelman, An. 1290. "All the juſtices of England, (ſaith he) were, An. 18. Ed. I. apprehended for corruption, except John Mettingham, and Elias Beckingham, whom I name for their honour; and, by judgment of parliament, condemned, ſome to impriſonment, others baniſhment, or confiſcation of their eſtates, and none eſcaped without grievous fines, and the loſs of their offices."

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